

# **CUSTOMS BULLETIN AND DECISIONS**

**Weekly Compilation of  
Decisions, Rulings, Regulations, Notices, and Abstracts  
Concerning Customs and Related Matters of the  
U.S. Customs Service  
U.S. Court of Appeals for the Federal Circuit  
and  
U.S. Court of International Trade**

**VOL. 36**

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**NO. 25**

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**DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE**

## **NOTICE**

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# U.S. Customs Service

## *Treasury Decisions*

19 CFR Part 12

(T.D. 02-30)

RIN 1515-AD12

### EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIALS FROM PERU

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: In T.D. 97-50, the Customs Regulations were amended to reflect the imposition of import restrictions on certain archaeological and ethnological materials originating in Peru. These restrictions were imposed pursuant to an agreement between the United States and Peru that was entered into under the authority of the Convention on Cultural Property Implementation Act in accordance with the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Recently, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, determined that conditions continue to warrant the imposition of these import restrictions for a period of five years from June 9, 2002. Thus, this document amends the Customs Regulations to reflect that the import restrictions continue. T.D. 97-50 contains the Designated List of Archaeological and Ethnological Materials that describes the articles to which the restrictions and this extension of restrictions apply.

EFFECTIVE DATE: This regulation becomes effective on June 6, 2002. The import restrictions continue and remain in effect for five years from June 9, 2002.

FOR FURTHER INFORMATION CONTACT: (Regulatory Aspects) Joseph Howard, Intellectual Property Rights Branch (202) 927-2336; (Operational Aspects) Al Morawski, Trade Operations (202) 927-0402.

## SUPPLEMENTARY INFORMATION:

## BACKGROUND

Pursuant to the provisions of the 1970 UNESCO Convention, codified into U. S. law as the Convention on Cultural Property Implementation Act (Pub. L. 97-446, 19 U.S.C. 2601 *et seq*)(the Act), the United States entered into a bilateral agreement with the Republic of Peru on June 9, 1997, concerning the imposition of import restrictions on certain pre-Columbian archaeological materials of Peru dating to the Colonial period and certain Colonial ethnological material from Peru. The U.S. Customs Service issued T.D. 97-50 (62 FR 31713, June 11, 1997) amending § 12.104g(a) of the Customs Regulations (19 CFR 12.104g(a)) to reflect the imposition of these restrictions for a period of five years.

Prior to the issuance of T.D. 97-50, Customs issued T.D. 90-37 (55 FR 19029, May 7, 1990) imposing emergency import restrictions on certain archaeological materials of Peru from the Sipan Archaeological Region forming part of the remains of the Moche culture. Under T.D. 90-37, § 12.104g(b) (19 CFR 12.104g(b)) of the regulations pertaining to emergency restrictions was amended accordingly. This emergency protection was extended in T.D. 94-54 (59 FR 32902, June 27, 1994). Subsequently, the archaeological materials covered by T.D. 90-37 were subsumed in T.D. 97-50 when it was published in 1997, at which time the emergency restrictions of T.D. 90-37 (as extended by T.D. 94-54) were removed from § 12.104g(b).

On March 5, 2002, the Assistant Secretary of Educational and Cultural Affairs, Department of State, after considering the findings and recommendations of the Cultural Property Advisory Committee and concluding that the cultural heritage of Peru continues to be in jeopardy from pillage of the archaeological and ethnological materials subject of the import restrictions of T.D. 97-50, made the necessary determinations to extend the import restrictions for an additional five years (in the Determination to Extend the Memorandum of Understanding Between the United States of America and the Government of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Prehispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru, Signed on June 9, 1997). Accordingly, Customs is amending § 12.104g(a) to reflect the extension of the import restrictions.

The Designated List of Archaeological and Ethnological Materials from Peru describing the materials covered by these import restrictions is set forth in T.D. 97-50. The list and accompanying image database may also be found at the following internet website address: <http://e.usia.gov/education/culprop>.

It is noted that the materials identified in T.D. 97-50 as "certain pre-Columbian archaeological materials of Peru dating to the Colonial period and certain Colonial ethnological material from Peru" are referred to in the Determination to Extend as "Archaeological Material from the Prehispanic Cultures and Certain Ethnological Material from the Colo-

nial Period of Peru." The materials identified in T.D. 97-50 and those identified in the Determination to Extend are one and the same materials.

The restrictions on the importation of these archaeological and ethnological materials from Peru are to continue in effect for five years from June 9, 2002. Importation of these materials continues to be restricted unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met. For example, these materials may be permitted entry if accompanied by appropriate export certification issued by the Government of Peru, or documentation showing that exportation from Peru occurred on or before June 11, 1997, or, with respect to materials from the Sipan archaeological region, on or before May 7, 1990. See 19 U.S.C. 2606(b)(1) and (2)(B); 19 CFR 12.104c(a) and (c).

#### INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

Because the amendment to the Customs Regulations contained in this document extends import restrictions already imposed on the above-listed cultural property of Peru by the terms of a bilateral agreement entered into in furtherance of a foreign affairs function of the United States, pursuant to the Administrative Procedure Act (5 U.S.C. 553(a)(1)), no notice of proposed rulemaking or public procedure is necessary and a delayed effective date is not required.

#### REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Accordingly, this final rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

#### EXECUTIVE ORDER 12866

This amendment does not meet the criteria of a "significant regulatory action" as described in E.O. 12866.

#### DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service.

#### LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspections, Imports, Cultural property.

#### AMENDMENT TO THE REGULATIONS

Accordingly, Part 12 of the Customs Regulations (19 CFR Part 12) is amended as set forth below:

#### PART 12—[AMENDED]

1. The general authority and specific authority citations for Part 12, in part, continue to read as follows:

**Authority:** 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

\* \* \* \* \*  
Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;  
\* \* \* \* \*

2. In § 12.104g(a), the list of agreements imposing import restrictions on described articles of cultural property of State Parties is amended in the entry for Peru by adding "extended by T.D. 02-30" immediately after "T.D. 97-50" in the column headed "T.D. No.".

ROBERT C. BONNER,  
*Commissioner of Customs.*

Approved: June 3, 2002.

TIMOTHY E. SKUD,

*Deputy Assistant Secretary of the Treasury.*

[Published in the Federal Register, June 6, 2002 (67 FR 38877)]

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## 19 CFR Part 10

(T.D. 02-31)

RIN 1515-AC59

### CIVIL AIRCRAFT

AGENCY: Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations concerning the duty-free entry of civil aircraft merchandise to reflect amendments to General Note 6 of the Harmonized Tariff Schedule of the United States made by the Miscellaneous Trade and Technical Corrections Act of 1996. The amendments allow an importer to claim duty-free admission of civil aircraft merchandise without submitting a certificate, or having one on file at Customs, at the time of entry. The amendments also allow an importer to make a post-entry claim for duty-free admission by filing a statement prior to liquidation of the entry or before the liquidation becomes final.

EFFECTIVE DATE: July 8, 2002.

FOR FURTHER INFORMATION CONTACT: Richard Wallio, Office of Field Operations, at (202) 927-9704.

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

This document amends § 10.183 of the Customs Regulations (19 CFR 10.183), which concerns Customs duty-free treatment of civil aircraft

merchandise. Section 10.183 implements General Note 6 of the Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. 1202), which implements the Agreement on Trade in Civil Aircraft (Title VI of the Trade Agreements Act of 1979, Pub. L. 96-39, 93 Stat. 144, July 26, 1979), to provide duty-free treatment for qualifying civil aircraft merchandise upon compliance with certain requirements. The term "civil aircraft merchandise" as used in this document covers merchandise that qualifies as "civil aircraft" under paragraph (b) of General Note 6, HTSUS, and thus is aircraft, aircraft engines, or ground flight simulators, including their parts, components, and subassemblies, that otherwise meet the requirements of paragraph (b).

General Note 6 of the HTSUS was amended by section 12 of the Miscellaneous Trade and Technical Corrections Act of 1996 (the Act), Pub. L. 104-295, 110 Stat. 3514 (October 11, 1996). Prior to the amendment, General Note 6 required that an importer entering merchandise duty-free under the General Note must file with Customs a written statement certifying that the merchandise: (i) is civil aircraft or has been imported for use in civil aircraft; (ii) will be so used; and (iii) has been approved for civil aircraft use by, or an application for approval has been submitted to, the Administrator of the Federal Aviation Administration (FAA) or by an airworthiness authority in the country of exportation (foreign airworthiness authority) if such approval is recognized by the FAA. General Note 6 defined the term "civil aircraft" as all aircraft other than aircraft purchased for use by the Department of Defense or the United States Coast Guard.

The Act amended General Note 6 to expand the definition of "civil aircraft." The Act also eliminated the statement (certification) filing requirement. The Act provided that a claim for duty-free treatment under General Note 6 is made by the importer by entering the merchandise under a tariff provision for which the program indicator "Free (C)" appears in the "Special" subcolumn of the tariff. (This is accomplished by placing the program indicator "C" on the entry summary.) This claim is deemed the importer's certification that the merchandise being entered is a civil aircraft or has been imported for use in a civil aircraft and will be so used. No additional statement is necessary to file.

Although the amendment eliminated the statement filing requirement, it requires that an importer maintain documentation to support the claim. It also provides that an importer may amend an entry or file a written statement to claim duty-free treatment under General Note 6 any time before the liquidation of the entry becomes final. A liquidation becomes final 90 days after the date notice of liquidation is given or transmitted to the importer (or its agent or consignee).

On June 29, 2000, Customs published a notice of proposed rulemaking (the NPRM) in the Federal Register (65 FR 40067) proposing to amend § 10.183 to reflect the statutory amendments made to General Note 6 by the Act. Section 10.183 of the Customs Regulations (19 CFR 10.183) currently provides that a written statement must be filed, along

with supporting documentation, with each entry summary or be on file with Customs at the time of entry as a blanket statement at the port where the entry is filed (19 CFR 10.183(c)). The regulation also provides that the statement could not be treated as a missing document that could be produced later under bond (under 19 CFR 141.66) and that failure to timely file the statement or to have a valid blanket statement on file at the port would result in a dutiable entry (19 CFR 10.183(c)(2)).

#### *Summary of Proposed Amendment*

The proposed amendment to § 10.183 was intended to conform the regulation to the statutory amendments made to General Note 6 by the Act. Thus, the proposed amendments: (1) expanded the regulation's coverage by broadening the description of civil aircraft; (2) eliminated the requirement that supporting documentation be filed with each entry summary; (3) required that supporting documentation be maintained in the importer's records; (4) eliminated the statement (certification) filing requirement; (5) allowed an importer to make a claim for duty-free admission under General Note 6 after the filing of an entry (that did not make a claim) but before its liquidation becomes final; and (6) provided that no interest attaches to refunds of duty resulting from post-entry claims.

#### DISCUSSION OF COMMENTS

The NPRM requested comments on the proposed amendments. Two commenters responded with various comments and recommendations that are summarized and responded to below.

##### *Comment:*

One comment concerned the meaning of proposed § 10.183(e), which provides that proof of end use of the entered merchandise in a qualifying manner (as or for use in civil aircraft) need not be maintained. The commenter asked whether this means that the importer's intent regarding imported civil aircraft merchandise, rather than the importer's actual use of that merchandise, is the qualifying factor for free entry under this provision.

##### *Customs Response:*

When an importer makes a claim for duty-free admission under General Note 6 by placing the "C" indicator on the entry summary to enter an article under a tariff provision for which the rate of duty "Free C" appears in the "Special" subcolumn, the importer, under General Note 6, is deemed to certify that the article is being imported for use in civil aircraft and will be so used. While General Note 6 does not mention the intent of the importer, this claim (deemed certification) is an expression of intent. Accordingly, it is the intent of the importer, as embodied in its claim for duty-free admission, that is determinative.

Tariff provisions that implement General Note 6 (which have the "Free C" designation in the "Special" subcolumn) are not actual use tariff provisions (as described in Additional U.S. Rule of Interpretation

1(b)). Therefore, there is no requirement to furnish proof of end use within three years after the date the civil aircraft merchandise is entered, as required under Additional U.S. Rule 1(b). Also, there is no time limit as to when imported merchandise must be used in civil aircraft.

Customs notes that under 19 U.S.C. 1484(a), importers are obligated to enter merchandise using reasonable care. This obligation extends to how an importer classifies entered merchandise and determines the duty owed to Customs. This obligation certainly applies to importers entering merchandise under a claim of eligibility for duty-free civil aircraft treatment.

*Comment:*

Both commenters inquired about what documentation is acceptable to show the importer's intent to use entered merchandise in a qualifying manner.

*Customs Response:*

Initially, Customs notes that documentation is not required to be filed with the entry summary under General Note 6 but must be maintained in accordance with Part 163 of the Customs Regulations (19 CFR 163).

Regarding acceptable documentation, paragraph (b)(i)(A) of General Note 6 provides, as an eligibility requirement for claiming civil aircraft as duty-free under these provisions, that there be certification or approval of the merchandise by an appropriate airworthiness authority. Having documents that show certification or approval of the merchandise by an appropriate airworthiness authority would be acceptable to demonstrate the importer's intent. Specifically, an importer of civil aircraft merchandise that meets the requirements of General Note (6)(b)(i)(B)(1) would possess either a certificate issued by the FAA or a comparable document issued by, and showing the approval of, an airworthiness authority in the country of exportation (foreign airworthiness authority). In the latter instance, an importer should be able to show that the FAA recognizes the approval as an acceptable substitute for FAA certification.

An importer of civil aircraft merchandise that meets the requirements of General Note (6)(b)(i)(B)(2) would possess an application (or copy of an application) for an FAA airworthiness certificate submitted to (and accepted by) the FAA by an existing "type and production certificate holder" under FAA law (49 U.S.C. 44702) and the type and production certificate of the certificate holder.

An importer of civil aircraft merchandise that meets the requirements of General Note (6)(b)(i)(B)(3) faces a somewhat different situation, as an application for an FAA certificate or for the approval of a foreign airworthiness authority relative to that merchandise will be submitted in the future. Thus, this importer will not possess a certificate or an approval, nor evidence that an application for a certificate or an approval has been submitted. However, this importer should possess the following documentation: (1) evidence tending to show that an existing type and production certificate holder will submit an application for



certification to the FAA or will seek approval from a foreign airworthiness authority; (2) the type and production certificate of the type and production certificate holder issued by the FAA; and (3) evidence showing that there is pending the completion of design or other technical requirements stipulated by the FAA.

Some additional evidence may be available and, if so, must be maintained in accordance with General Note 6(a)(i), such as evidence having to do with the importer's estimate of the quantities of parts, components, and subassemblies as are required to meet the design and technical requirements stipulated by the FAA, in accordance with the limitation of General Note 6(b)(iii).

Importers should endeavor to have and maintain whatever evidence is available in all of these cases to show compliance with the requirements of General Note 6 and the regulations.

*Comment:*

A comment concerned whether FAA approval is required for all imported goods for which duty-free admission is claimed. The commenter noted that a recent Customs audit interpretation concluded that a part not covered by a certificate would qualify for duty-free treatment if it could be shown that the part went into an aircraft qualifying as a civil aircraft under General Note 6.

*Customs Response:*

All merchandise entered under General Note 6 requires an FAA airworthiness certification or the approval of a foreign airworthiness authority recognized as acceptable by the FAA in accordance with paragraph (b)(i)(B)(1) of General Note 6, or evidence that airworthiness certification/approval has been or will be applied for in accordance with paragraphs (b)(i)(B)(2) or (b)(i)(B)(3) of the general note. Merchandise must comply with one of these airworthiness certification provisions in order to meet the definition of General Note 6(b). Merchandise that fails to so comply is not eligible for duty-free treatment under these provisions.

*Comment:*

Another comment concerned safeguards for ensuring that merchandise entered duty-free as civil aircraft merchandise is used as intended. Specifically, the commenter asked if there will be measures in place to guarantee that merchandise imported by a party with the intent that it be used in civil aircraft will be so used when it is sold after entry to a distributor rather than an end user.

*Customs Response:*

There will be no special measures to ensure that merchandise imported with the intent to be used in a qualifying manner under the general note are so used in the future. As tariff provisions affected by the general note are not actual use tariff provisions, importers entering merchandise under these provisions are not required to submit proof of



actual use. Customs will enforce General Note 6 with audits and the port director's authority to request verifying documentation at any time.

Customs believes that the safeguards reside in the certification process itself, as the airworthiness certification or approval measures provide reasonable assurance that merchandise imported duty-free as civil aircraft merchandise is likely intended for such use and will likely be used in accordance with that certificate or approval (including those situations where the certificate or approval has been applied for or will be applied for in the future). Of course, importers who mistakenly enter merchandise duty-free under the general note should report the correction to Customs in accordance with the regulations.

*Comment:*

Another comment concerned proposed § 10.183(c), which pertains to making a claim for duty-free admission under General Note 6. Under this section, merchandise previously exported with benefit of drawback is not precluded from qualifying for duty-free treatment as civil aircraft merchandise. The commenter stated that this principle should be expanded to assure importers that free entry of civil aircraft merchandise will not be precluded where qualifying merchandise has previously been exported in the following circumstances: (1) from continuous Customs custody with remission, abatement, or refund of duty; (2) in compliance with any law of the United States or regulation of any federal agency requiring exportation; or (3) after manufacture or production in the United States in a Customs bonded warehouse or foreign trade zone or under heading 9813.00.05, HTSUS, pertaining to articles admitted into the United States free of duty and under bond to be repaired, altered, or processed. The commenter stated that previous exportation under the foregoing various circumstances precludes free entry under other provisions of law (such as Chapter 98, HTSUS, subchapter II, U.S. Note 1).

The commenter requested the addition of language to proposed § 10.183(c) to prevent the preclusion of free entry of civil aircraft parts previously exported under any of the circumstances described above.

*Customs Response:*

Customs does not see the need to add to the regulation the recommended language. Free entry under the civil aircraft agreement is not expressly precluded under any of these circumstances, and Customs is not aware of, nor has the commenter cited, instances when free entry was denied on account of merchandise having been previously exported as described.

*Comment:*

A commenter requested that the first sentence of proposed section 10.183(e) be changed by deleting the words "any additional documentation Customs may require to verify the claim for duty-free admission, including." As changed, the only documentary requirement will be the written order or contract and the evidence of FAA (or other airworthiness authority) certification. The commenter contended that these doc-

uments serve to verify the claim sufficiently and that the "additional documentation" language creates uncertainty as to whether other documentation will be required. If Customs desires other documentation, stated the commenter, it should specify the nature of that documentation.

*Customs Response:*

It is possible that additional documentation, other than the order or contract and an FAA certification (or foreign airworthiness authority approval), may be involved. The importer may have to show possession of a type or production certificate, for example. In addition, other documentation may be required in instances where an application for an airworthiness certification or approval has not yet been filed. The demand for additional information is limited to documentation tending to sustain the duty-free claim under the program. While Customs believes that this will not lead to uncertainty, it is amending the language of proposed § 10.183(e) to be more precise.

*Comment:*

A commenter requested the deletion of the third sentence of proposed § 10.183(e) pertaining to the proscription of a claim for duty-free treatment under General Note 6 when the importer is not in possession of required documentation at the time of entry. This section of the proposed regulation provides that if an importer is not in possession of required documents at the time of entry, it should not then make a claim for duty-free admission, but may later make the claim under § 10.183(f) which allows a post-entry claim.

The commenter contended that the physical possession of supporting documentation should not be a prerequisite to the claim for duty-free treatment. Physical possession of documentation required to support other duty-free claims under Part 10 is not required, stated the commenter, and there is no legitimate need to include such a requirement here. Such a requirement, claimed the commenter, is tantamount to reinstating the certification filing requirement that Congress removed when it amended General Note 6.

*Customs Response:*

Customs agrees that other duty-free provisions under Part 10 of the regulations do not explicitly provide that importers must possess required documents at the time of entry. Rather, these provisions provide that the importer must maintain the required documentation in accordance with Part 163 of the regulations and produce it upon Customs request. Some provisions under Part 10 provide that failure to produce documentation upon request results in denial of duty-free treatment. Customs therefore believes that the civil aircraft program under General Note 6 can be administered and enforced adequately using similar measures.

Thus, proposed § 10.183(e) is modified in this document by removing language specifying that importers must be in possession of required

documents at the time of entry in order to claim duty-free treatment under the general note. The regulation, as amended in this document, retains the requirement that importers must maintain supporting documentation in accordance with Part 163 of the regulations and adds that maintenance of these records is also in accordance with paragraph (a)(i) of General Note 6. The amended regulation also adds language providing that port directors may request production of supporting documentation at any time and that failure to produce sufficient documentation upon request, during the five year retention period, will result in the loss of duty-free treatment.

Customs modifies the proposed regulation in this way to notify the public that the civil aircraft program under General Note 6 will be administered and enforced through document review under the authority of Customs audits or a demand by the port director in circumstances the port director deems appropriate. It is Customs position, however, that importers must be able to verify claims for duty-free admission under the general note at any time Customs calls upon them to do so, including at the time of entry should that occur. It is thus best that importers have possession of supporting documentation at the time of entry.

*Comment:*

The last sentence of proposed § 10.183(e) provides that proof of the imported civil aircraft merchandise's end use need not be maintained by the importer. A commenter requested that this sentence be amended to provide that proof of end use also need not be furnished to Customs. This change, stated the commenter, will further confirm that civil aircraft tariff provisions (those with the indicator "Free C" in the Special subcolumn designating duty free entry under General Note 6) are not "actual use" provisions subject to the requirements of Additional U.S. Rule of Interpretation 1(b), HTSUS, which requires that proof of end use of the merchandise be submitted to Customs within three years of entry.

*Customs Response:*

Customs disagrees. None of the civil aircraft provisions in the HTSUS are actual use provisions, and the language of proposed § 10.183(e) is not ambiguous in this regard. Customs believes that this requested change is unnecessary.

*Comment:*

A commenter asserted that proposed § 10.183(g) should be deleted, as proposed § 10.183(e) already makes clear that documentation supporting duty-free admission must be maintained in accordance with Part 163 of the Customs Regulations (19 CFR Part 163). The commenter pointed out that under the provisions of Part 163, documentation is subject to Customs requests for information, compliance assessments, investigations, and other forms of Customs inquiry. Accordingly, there is no reason for special monitoring or auditing under § 10.183. Civil air-

craft importers should not be subject to any greater or lesser scrutiny than any other importers.

*Customs Response:*

Customs disagrees. Customs has always been charged with the obligation to enforce the provisions of the civil aircraft agreement (as implemented by General Note 6, HTSUS) to protect the revenue, and there is nothing improper in making explicit in the regulation Customs intent to do so by monitoring and auditing entries. At worst, § 10.183(g) is redundant, but Customs believes it is worthy to set forth in the regulation that entries will be monitored.

CONCLUSION

After analysis of the comments received, as set forth above, and further review of the matter, Customs has determined that the proposed amendments should be adopted as a final rule with the changes discussed above and as set forth below.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

This amendment will make importations of civil aircraft merchandise less burdensome for importers than is the case under current regulations. Accordingly, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments to the Customs Regulations in this final rule will not have a significant economic impact on a substantial number of small entities. Thus, these amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information contained in this notice has previously been reviewed and approved by the Office of Management and Budget (OMB) under OMB control number 1515-0065 (Entry Summary), 1515-0069 (Immediate Delivery Application), and 1515-0144 (Customs Bond Structure). This rule does not substantially change the existing approved information collection. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices contributed in its development.

LIST OF SUBJECTS IN 19 CFR PART 10

Aircraft, Customs duties and inspection, Entry, Reporting and recordkeeping requirements.

## AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, Part 10 of the Customs Regulations (19 CFR Part 10) is amended as follows:

**PART 10—ARTICLES CONDITIONALLY FREE,  
SUBJECT TO A REDUCED RATE, ETC.**

1. The general authority citation for part 10 is revised, and the specific authority citation for § 10.183 is added, to read as follows:

**Authority:** 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States (HTSUS)), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314;

\* \* \* \* \*

Section 10.183 also issued under 19 U.S.C. 1202 (General Note 6, HTSUS);

\* \* \* \* \*

2. Section 10.183 is revised to read as follows:

**§ 10.183 Duty-free entry of civil aircraft, aircraft engines, ground flight simulators, parts, components, and subassemblies.**

(a) *Applicability.* Except as provided in paragraph (b) of this section, this section applies to aircraft, aircraft engines, and ground flight simulators, including their parts, components, and subassemblies, that qualify as civil aircraft under General Note 6(b) of the Harmonized Tariff Schedule of the United States (HTSUS) by meeting the following requirements:

(1) The aircraft, aircraft engines, ground flight simulators, or their parts, components, and subassemblies, are used as original or replacement equipment in the design, development, testing, evaluation, manufacture, repair, maintenance, rebuilding, modification, or conversion of aircraft; and

(2) They are either:

(i) Manufactured or operated pursuant to a certificate issued by the Administrator of the Federal Aviation Administration (FAA) under 49 U.S.C. 44704 or pursuant to the approval of the airworthiness authority in the country of exportation, if that approval is recognized by the FAA as an acceptable substitute for the FAA certificate;

(ii) Covered by an application for such certificate, submitted to and accepted by the FAA, filed by an existing type and production certificate holder pursuant to 49 U.S.C. 44702 and implementing regulations (Federal Aviation Administration Regulations, title 14, Code of Federal Regulations); or

(iii) Covered by an application for such approval or certificate which will be submitted in the future by an existing type and production certificate holder, pending the completion of design or other technical requirements stipulated by the FAA (applicable only to the quantities of parts, components, and subassemblies as are required to meet the stipulation).

(b) *Department of Defense or U.S. Coast Guard use.* If purchased for use by the Department of Defense or the United States Coast Guard, aircraft, aircraft engines, and ground flight simulators, including their parts, components, and subassemblies, are subject to this section only if they are used as original or replacement equipment in the design, development, testing, evaluation, manufacture, repair, maintenance, rebuilding, modification, or conversion of aircraft and meet the requirements of either paragraph (a)(2)(i) or (a)(2)(ii) of this section.

(c) *Claim for admission free of duty.* Merchandise qualifying under paragraph (a) or paragraph (b) of this section is entitled to duty-free admission in accordance with General Note 6, HTSUS, upon meeting the requirements of this section. An importer will make a claim for duty-free admission under this section and General Note 6, HTSUS, by properly entering qualifying merchandise under a provision for which the rate of duty "Free (C)" appears in the "Special" subcolumn of the HTSUS and by placing the special indicator "C" on the entry summary. The fact that qualifying merchandise has previously been exported with benefit of drawback does not preclude free entry under this section.

(d) *Importer certification.* In making a claim for duty-free admission as provided for under paragraph (c) of this section, the importer is deemed to certify, in accordance with General Note 6(a)(ii), HTSUS, that the imported merchandise is, as described in paragraph (a) or paragraph (b) of this section, a civil aircraft or has been imported for use in a civil aircraft and will be so used.

(e) *Documentation.* Each entry summary claiming duty-free admission for imported merchandise in accordance with paragraph (c) of this section must be supported by documentation to verify the claim for duty-free admission, including the written order or contract and other evidence that the merchandise entered qualifies under General Note 6, HTSUS, as a civil aircraft, aircraft engine, or ground flight simulator, or their parts, components, and subassemblies. Evidence that the merchandise qualifies under the general note includes evidence of compliance with paragraph (a)(1) of this section concerning use of the merchandise and evidence of compliance with the airworthiness certification requirement of paragraph (a)(2)(i), (a)(2)(ii), or (a)(2)(iii) of this section, including, as appropriate in the circumstances, an FAA certification; approval of airworthiness by an airworthiness authority in the country of export and evidence that the FAA recognizes that approval as an acceptable substitute for an FAA certification; an application for a certification submitted to and accepted by the FAA; a type and production certificate issued by the FAA; and/or evidence that a type and production certificate holder will submit an application for certification or approval in the future pending completion of design or other technical requirements stipulated by the FAA and of estimates of quantities of parts, components, and subassemblies as are required to meet design and technical requirements stipulated by the FAA. This documentation need not be filed with the entry summary but must be maintained in ac-

cordance with the general note and with the recordkeeping provisions of Part 163 of this chapter. Customs may request production of documentation at any time to verify the claim for duty-free admission. Failure to produce documentation sufficient to satisfy the port director that the merchandise qualifies for duty-free admission will result in a denial of duty-free treatment and may result in such other measures permitted under the regulations as the port director finds necessary to more closely monitor the importer's importations of merchandise claimed to be duty-free under this section. Proof of end use of the entered merchandise need not be maintained.

(f) *Post-entry claim.* An importer may file a claim for duty-free treatment under General Note 6, HTSUS, after filing an entry that made no such duty-free claim, by filing a written statement with Customs any time prior to liquidation of the entry or prior to the liquidation becoming final. When filed, the written statement constitutes the importer's claim for duty-free treatment under the general note and its certification that the entered merchandise is a civil aircraft or has been imported for use in a civil aircraft and will be so used. In accordance with General Note 6, HTSUS, any refund resulting from a claim made under this paragraph will be without interest, notwithstanding the provision of 19 U.S.C. 1505(c).

(g) *Verification.* The port director will monitor and periodically audit selected entries made under this section.

ROBERT C. BONNER,  
*Commissioner of Customs.*

Approved: June 3, 2002.

TIMOTHY E. SKUD,

*Deputy Assistant Secretary of the Treasury.*

[Published in the Federal Register, June 7, 2002 (67 FR 39286)]







# U.S. Customs Service

## *General Notices*

### EXPANSION OF NATIONAL CUSTOMS AUTOMATION PROGRAM TEST OF SEMI-MONTHLY STATEMENT PROCESSING TO ADDITIONAL PORTS OF ENTRY

AGENCY: Customs Service, Treasury.

ACTION: General notice.

**SUMMARY:** This notice announces Customs plan to expand for current participants the testing of the semi-monthly filing and statement processing program (semi-monthly processing) to seven additional ports of entry, and invites those participants to file their statements at these additional ports. The expansion of this National Customs Automation Program test to the additional ports will enable Customs to more fully evaluate the national effect of this program for its final integration into the Automated Commercial Environment. The test is not being opened for new participants.

For the convenience of participants in this program test, this notice lists all the ports of entry—both existing and the additions—where participants may file their entry summaries and make payment of duties, taxes, and fees owed.

**EFFECTIVE DATES:** Current participants will be able to file semi-monthly statements at the additional ports of entry July 8, 2002; however, participants will need to notify the Entry Branch Supervisor at each additional port of entry to arrange for an exact start date and to receive any additional instructions. Evaluations of the semi-monthly processing at all the ports identified will continue to be conducted periodically.

**FOR INFORMATION CONTACT:** For inquiries regarding the ports of entry added to the semi-monthly processing prototype contact Debbie Scott, Entry and Drawback Management Team, (202) 927-1962.

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

Title VI of the North American Free Trade Agreement Implementation Act (the Act), Pub.L. 103-182, 107 Stat. 2057 (December 8, 1993), contains provisions pertaining to Customs Modernization (107 Stat.

2170). Subtitle B of Title VI establishes the National Customs Automation Program (NCAP)—an automated and electronic system for the processing of commercial importations. Pursuant to these provisions, Customs is developing a new commercial processing system, the Automated Commercial Environment (ACE). The ACE is being designed to support the new Trade Compliance processes. One of the main features of the ACE will be the periodic summary filing and periodic statements function, which will enable each account to pay duties, taxes, fees, and other payments owed using a periodic statement cycle. Periodic summary filing and statement functional capabilities eventually will be fully integrated into the new ACE system. Semi-monthly processing using the current Automated Commercial System (ACS) will eventually cease as the ACE system is deployed nationwide.

For programs designed to evaluate existing and planned components of the National Customs Automation Program (NCAP), § 101.9(b) of the Customs Regulations (19 CFR 101.9(b)) implements the NCAP testing procedures. As the periodic summary filing and periodic statements function (semi-monthly filing and statement processing prototype) concerns an existing component of the NCAP relating to the electronic payment of duties, fees, and taxes, the semi-monthly processing test was established pursuant to that regulation. See, the Federal Register Notice published March 30, 1998 (63 FR 15259) for a fuller explanation of this test.

When initially established in 1998, the semi-monthly filing and statement processing prototype (semi-monthly processing) was implemented at only 14 ports of entry and it was stated in the Federal Register Notice that the testing of this prototype would be implemented over an 18-month period and would end when the periodic payment/statement feature of ACE is available. To date, the ACE is not fully implemented, and the testing of the semi-monthly processing prototype is incomplete. The reasons for these developments are many: the continuing reorganization of Customs, budgeting difficulties, the occurrence of other national events, which has occasioned a shifting of Customs priorities, etc. Regarding the locations where semi-monthly processing are currently authorized to be filed, evaluations of the prototype conducted to date with participants show a concern that the prototype testing should be expanded to additional ports, so that the national effect of this program can be fully gauged. Accordingly, Customs is announcing in this document that seven new ports of entry will be authorized so that current participants may file their entry summaries and make payment of duties, taxes, and fees owed. The seven new ports of entry are located at:

Dallas, Texas;  
Houston, Texas;  
Indianapolis, Indiana;  
Jacksonville, Florida;  
Memphis, Tennessee;  
Norfolk, Virginia; and  
Savannah, Georgia.

Current participants will be able to file semi-monthly statements at any of these additional ports 30 days after this Notice is published in the Federal Register. However, participants will need to notify the Entry Branch Supervisor at each additional port of entry to arrange for an exact start date and to receive any additional instructions. It is noted that the test is not being opened for new participants. Evaluations of the semi-monthly processing at all the ports identified will continue to be conducted periodically.

For the convenience of participants in this program test, this notice summarily lists, alphabetically by State, all the ports of entry—both existing and the additions—eligible for the semi-monthly processing prototype:

- In California, the ports at Los Angeles-Long Beach and San Francisco-Oakland;
- In Florida, the ports at Jacksonville and Miami;
- In Georgia, the ports at Atlanta and Savannah;
- In Illinois, the port at Chicago;
- In Indiana, the port at Indianapolis;
- In Michigan, the ports at Detroit and Port Huron;
- In New York, the ports at Buffalo-Niagara Falls and New York;
- In Ohio, the port at Cleveland;
- In South Carolina, the port at Charleston;
- In Tennessee, the port at Memphis;
- In Texas, the ports at Dallas-Fort Worth, El Paso, Houston-Galveston, and Laredo;
- In Virginia, the port at Norfolk-Newport News; and
- In Washington, the port at Puget Sound.

Customs requests that participants be active in the evaluation of the semi-monthly test.

Dated: May 31, 2002.

BONNI G. TISCHLER,  
*Assistant Commissioner,  
Office of Field Operations.*

[Published in the Federal Register, June 6, 2002 (67 FR 39098)]

DEPARTMENT OF THE TREASURY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS,  
*Washington, DC, June 5, 2002.*

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,  
*Acting Assistant Commissioner,  
Office of Regulations and Rulings.*

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PROPOSED REVOCATION OF RULING LETTERS AND  
REVOCATION OF TREATMENT RELATING TO THE TARIFF  
CLASSIFICATION OF TIN-PLATED CONTAINERS WITH  
HANDLES AND HINGES NOT DESIGNED TO BE USED  
PRIMARILY AS SALES PACKING NOR DESIGNED AS TABLE,  
KITCHEN OR OTHER HOUSEHOLD ARTICLES OF IRON OR  
STEEL

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letters and revocation of treatment relating to the classification of tin-plated containers with handles and hinges, not designed to be used primarily as sales packing nor designed as table, kitchen or other household articles of iron or steel.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of tin-plated containers with handles and hinges, not designed to be used primarily as sales packing nor designed as table, kitchen or other household articles of iron or steel. Customs also proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before July 19, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229, Attention: Textiles Branch. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: J. Steven Jarreau, Textiles Branch: (202) 927-2518 or, after June 7, 2002, (202) 572-8817

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, 19 U.S.C. 1484, the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke two rulings relating to the tariff classification of tin-plated containers with handles and hinges, not designed to be used primarily as sales packing nor designed as table, kitchen or other household articles of iron or steel. Although in this notice Customs is specifically referring to two Headquarters Ruling Letters, this notice covers any rulings on this merchandise which may exist, but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, which classified the merchandise contrary to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)) as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party,

Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importers or their agents for importation of merchandise subsequent to the effective date of the final decision on this notice.

The Customs Service in Headquarters Ruling Letters (HQ) 961707 (Mar. 19, 1999) and HQ 964234 (April 23, 2001) classified tin-plated containers with handles and hinges, not designed to be used primarily as sales packing nor designed as table, kitchen or other household articles of iron or steel, pursuant to General Rule of Interpretation 1, in subheading 4202.19.000, HTSUSA. Headquarters Ruling Letters 961707 (Mar. 19, 1999) and HQ 964234 (April 23, 2001) are set forth as "Attachment A" and "Attachment B" to this document.

It is now Customs determination that tin-plated containers with handles and hinges, not designed to be used primarily as sales packing nor designed as table, kitchen or other household articles of iron or steel are properly classified, pursuant to General Rule of Interpretation 1, in subheading 7326.90.1000, HTSUSA. Proposed Headquarters Ruling Letter 965554, revoking HQ 961707, is set forth as "Attachment C" and proposed Headquarters Ruling Letter 965555, revoking HQ 964234, is set forth as "Attachment D" to this document.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke HQ 961707 and HQ 964234 and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 965554 and HQ 965555. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: June 3, 2002.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

## [ATTACHMENT A]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC, March 19, 1999.

CLA-2 RR:CR:TE 961707 RH

Category: Classification

Tariff No. 4202.19.0000

MR. DAVID M. RICKERT  
E. BESLER & COMPANY  
P.O. Box 66361  
Chicago, IL 60666-0361

Re: Revocation of PD C85024; Classification of a metal lunch box with or without a thermos; subheading 4202.19.0000; subheading 4202.99.9000.

DEAR MR. RICKERT:

On March 31, 1998, Customs issued Port Decision (PD) C85024, to you on behalf of your client, The Thermos Company, regarding the classification of a metal lunch box. The ruling classified the box under subheading 4202.92.9900 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We note that this tariff provision does not exist and was an apparent typographical error. The applicable tariff provision in PD C95024 should have been 4202.99.9000, HTSUSA.

We have been asked by Customs National Commodity Specialist Division to review that decision and to consider classification of the lunch box under subheading 4202.19.0000, HTSUSA. Pursuant to section 1625(c)(1) of the United States Code (19 U.S.C. §1625(c)(1)), notice of the proposed revocation of PD C85024 was published on October 28, 1998, in the CUSTOMS BULLETIN, Volume 32, No. 43.

*Facts:*

The lunch box under consideration measures approximately 9 x 7 x 4 inches. It has a secured top closure and a single carrying handle. The box is not insulated and is entirely composed of metal. It will be imported both with and without a thermos® inside.

*Issue:*

Is the metal lunch box classifiable under subheading 4202.19.0000, HTSUSA, which covers articles such as trunks, suitcases, vanity cases, attache cases, briefcases and similar containers: Other, or under subheading 4202.99.9000, HTSUSA, a residual provision?

*Law and Analysis:*

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification is determined first in accordance with the terms of the headings of the tariff and any relative section or chapter notes. Where goods cannot be classified on the basis of GRI 1, the remaining GRI will be applied in order. Moreover, Customs refers to the Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) for guidance. While not legally binding, the EN constitute the official interpretation of the HTSUSA at the international level.

Heading 4202, reads in its entirety:

Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

The articles specified in heading 4202 are broken into two sections separated by a semicolon. The EN to heading 4202, state in pertinent part that:

The articles covered by the first part of the heading may be of any material \* \* \* The articles covered by the second part of the heading must, however, be only of the materials specified therein or must be wholly or mainly covered with such materials or with paper. \* \* \*



In HQ 953663, dated May 21, 1993, Customs held that lunch boxes were designed primarily for the convenience of the traveler to carry and store food and beverages and are similar to containers enumerated in the first half of the heading. Thus, there was no requirement that they be composed of a particular material.

Heading 7323, HTSUSA, also merits consideration in this case. That provision provides for "Table, kitchen or other household articles and parts thereof, of iron or steel; iron or steel wool; pot scourers and scouring or polishing pads, gloves and the like, of iron or steel." The EN to heading 7323 reads, in pertinent part, that the heading includes:

Other household articles such as wash coppers and boilers; dustbins, buckets, coal scuttles and hods; watering-cans; ash-trays; hot water bottles; bottle baskets; movable boot-scrappers; stands for flat irons; baskets for laundry, fruit, vegetables, etc.; letter-boxes; clothes-hangers, shoe trees; **luncheon boxes**. (Emphasis supplied).

Heading 3924, HTSUSA, is a parallel provision for plastic household items. It encompasses "Tableware, kitchenware, other household articles and toilet articles, of plastics." Like the EN to heading 7323, the EN to heading 3923 states that the heading includes "**luncheon boxes**." (Emphasis supplied).

In HQ 088472, dated August 17, 1992, Customs addressed whether a plastic lunch box was analogous to a luncheon box and, therefore, classifiable under heading 3923. We held:

Customs position is that Heading 3924 provides for items which are used in the home (hence the wording of that heading, "Tableware, kitchenware, other household articles and toilet articles, of plastic"), while articles which are generally carried around with the owner are classified in Heading 4202, HTSUSA. It is our opinion that the reference to a "luncheon box" in Explanatory Note (c) of Heading 3924 means a plastic container designed to store and protect food or luncheon meats while in the home, e.g., a lidded Tupperware storage box for luncheon meats. Each of the exemplars cited in the Heading 3924 Explanatory Notes are articles primarily used in the household, therefore the instant lunch box, which is used to transport food and beverages between the home and school, is not ejusdem generis with the exemplars.

See, HQ 952702, dated April 9, 1993; HQ 087281, dated October 29, 1990; HQ 950049, dated April 21, 1992; HQ 088472, dated August 17, 1992.

The metal lunch box at issue is used to transport food and beverages between the home and school, and is not a "luncheon box" designed to store and protect food or luncheon meats in the home. Accordingly, like the plastic lunch boxes in the above cited rulings which Customs found were not "other household articles" of heading 3924, the metal lunch box is not an "other household article" of heading 7323.

We find that the metal lunch box is similar to the containers enumerated in the first part of heading 4202. Accordingly, it is classifiable under heading 4202. See, Headquarters Ruling Letter (HQ) 953044, dated April 19, 1993, and HQ 952702, dated April 9, 1993. The issue is under which subheading to classify the metal lunch box. In PD C85024, Customs classified the metal lunch box at issue under subheading 4202.99.9000, which is a residual provision. The competing provision is subheading 4202.19.0000, which covers articles such as trunks, suitcases, vanity cases, attache cases, briefcases and similar containers.

A similar issue was raised in HQ 953044 and HQ 952702, in which Customs modified the classification of plastic lunch boxes under 4202.99.9000. The classification of the lunch boxes in those cases was changed to subheading 4202.12.20, HTSUSA, which covers articles with an outer surface of plastic that are similar to articles enumerated in the first part of heading 4202 (prior to the semicolon). We note that, although the holdings in HQ 953044 and HQ 952702 were correct, Customs should have based its modification to the classification on the conclusion that an "other" (or residual) tariff provision is not applicable where a prior provision describes the merchandise, and not because the residual provision did not provide for the boxes as specifically as did subheading 4202.12.20. In this case, we find that subheading 4202.19.0000 describes the metal lunch box. Therefore, subheading 4202.99.9000, the residual provision, is not applicable.

Finally, you state in your submission that the metal lunch box may be imported with a 10 ounce roughneck bottle inside. Although you do not provide sufficient information for us to determine the classification of the bottle, we assume that the metal lunch box and bottle may be classifiable under different headings. When goods are *prima facie* classifiable under two or more headings, GRI 3 must be consulted. GRI 3(b) provides that goods put up in sets for retail sale shall be classified as if they consisted of the component which gives them their essential character.



The EN state in Note (X) to Rule 3(b) that the term "goods put up in sets for retail sale" means goods which:

- (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings;
- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to users without repacking.

The subject lunch box with bottle meets criteria (a), (b), and (c) above. Both items allow for the short term storage of consumable goods. As imported, the box and bottle are put up in a manner suitable for retail sale to the consumer without any need for repacking. With the above elements satisfied, the essential character of the set must be determined to allow for proper classification. In general, "essential character" has been construed to mean the attribute which strongly marks or serves to distinguish an article. It may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods.

In this case, the lunch box facilitates the transportation of food and drink from one location to another. Its role in relation to the overall use of the goods is paramount. Consequently, the lunch box represents the essential character of the set. The set as a whole, therefore, is classifiable in heading 4202.

*Holding:*

The metal lunch box at issue is classifiable under subheading 4202.19.0000, HTSUSA. The general column one rate applicable in 1999 is 20 percent *ad valorem*.

PD C85024, dated March 31, 1998, is hereby revoked. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. §1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 C.F.R. §177.10(c)(1)).

JOHN DURANT,  
Director,  
Commercial Rulings Division.

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[ATTACHMENT B]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC, April 23, 2001.  
CLA-2RR:CR:TE 964234sjj  
Category: Classification  
Tariff No. 4202.19.0000

MS. KATHY M. BELAS  
JAMES G. WILEY CO.  
P.O. Box 90008  
Los Angeles, CA 90009-0008

Re: Classification of "lunch tote"; Subheading 4202.19.0000, HTSUSA.

DEAR MS. BELAS:

The purpose of this correspondence is to respond to your request of May 10, 2000, directed to the New York office of the U.S. Customs Service. The correspondence in issue requested, on the behalf of your client Dorothy Thorpe/Christmas Corner, a binding classification ruling of the item described as a "lunch tote."

A sample was provided along with a card identifying the item as a "lunch tote," style 10370. The card additionally indicated that the merchandise is a product of China. The sample will be returned in accordance with your request.

This ruling letter is being issued subsequent to a review of your correspondence of May 10, 2000, and a telephone conference conducted with a member of my staff on September 1, 2000.

**Facts:**

The article submitted for consideration has the shape of a traditional school lunch box and measures seven and one-half (7-1/2) inches in length, three and one eighth (3-1/8) inches in width and has a height of five and one-eighth (5-1/8) inches. It is composed of metal believed by the Customs Service to be sheet steel that may or may not be tin-plated. The request you submitted suggests that the item is made of tin. No laboratory analysis has been performed to determine its precise composition.

The "lunch tote" has a plastic handle on top that swivels side to side. One side of the item opens and may be secured closed by a latch on the top. Attachments for a shoulder strap are located on the narrow or width sides, one and one-half (1-1/2) inches from the top. No shoulder straps accompanied the sample. It is not insulated and does not have an accompanying container or interior attachment designed to facilitate the transportation and storage of liquids.

**Issue:**

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described multiple-use, metal-sided, hinged container possessing a handle and identified as a "lunch tote"?

**Law and Analysis:**

The classification of imported merchandise pursuant to the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." The subsequent General Rules of Interpretation are to be consulted only if an analysis of the headings, section and chapter notes, in accordance with the dictates of GRI 1, proves inadequate to classify the merchandise.

The principal HTSUSA headings considered by the Customs Service in rendering this Ruling Letter are: (1) Heading 4202, HTSUSA; and (2) Heading 7326, HTSUSA. Heading 4202 of Chapter 42, *Articles of Leather; Saddlery and Harness; Travel Goods, Handbags and Similar Containers; Articles of Animal Gut (Other than Silkworm Gut)*<sup>1</sup>, provides:

4202 Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper.

Heading 7326 of Chapter 73, *Articles of Iron or Steel*<sup>2</sup>, provides:

7326 Other articles of iron or steel.

Heading 4202, HTSUSA, provides for the classification of two primary groups of merchandise: "[t]runks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers" and "traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, rnap cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder, cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper." The two groups of items enumerated in heading 4202, HTSUSA, are separated by a semicolon.

The significance of the semicolon in separating the two parts of heading 4202, HTSUSA, is explained in the Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System. The Explanatory Notes constitute the official interpretation of the Harmonized System at the international level. The EN, although neither legally binding or dispositive of classification issues, do provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89-80, 54 Fed. Reg. 35127-28 (Aug. 23, 1989).

<sup>1</sup> Titles of chapters are provided for ease of reference only. General Rule of Interpretation 1.

<sup>2</sup> See id.

The EN to heading 4202, HTSUSA, provides that the "articles covered by the first part of the heading may be of any material." *Explanatory Note 42.02*. The first part of heading 4202, HTSUSA, is that part of the heading that precedes the semicolon. The EN continues by explaining that the articles enumerated in "the second part of the heading must, however, be only of the materials specified therein." *Explanatory Note 42.02*.

The container in issue, a multiple-use, metal-sided, hinged box with a handle, referred to as a "lunch tote," is *ejusdem generis* or "of the same kind" of containers enumerated in the first part of heading 4202, HTSUSA. See *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994) (discussing the statutory construction concept of *ejusdem generis*). The containers in the first part of heading 4202, HTSUSA, "[t]runks, suitcases, vanity cases, attache cases, briefcases, school satchels and similar containers" are designed to organize, store, protect and carry various items during travel. See *Totes, Inc. v. United States*, 69 F.3d 495 (Fed. Cir. 1995), HQ 953663. Since the "lunch tote" is similar to the containers enumerated *eo nomine* in the first part of heading 4202, HTSUSA, the material of which it is composed is not of consequence.

The Customs Service, prior to concluding its legal analysis of the instant merchandise, reviewed the decision of *SGI, Inc. v. United States*, 122 F.3d 1468 (Fed. Cir. 1997). The Court in *SGI* was called on to address the classification of portable soft-sided vinyl coolers possessing insulative properties similar to both hard and other soft-sided coolers having a one-half inch thick closed cell polyethylene foam insulation used solely for the preservation and storage of food or beverages. The merchandise under classification in this ruling letter is a metal-sided, hinged box with a handle, that has multiple uses, one of which happens to be as a lunch box. It is the conclusion of the Customs Service, subsequent to considering the multiple uses of the item in issue, that the decision of the court in *SGI* does not have precedential weight with regards to multiple use, metal-sided, hinged boxes possessing handles.

The "lunch tote" submitted for classification is similar in shape and utility to a traditional lunch box, although smaller. The Customs Service has previously addressed the classification of multiple-use, metal-sided, hinged containers or lunch boxes with handles and has consistently ruled, as stated above, that they are, for classification purposes, similar to the items in the initial part of heading 4202, HTSUSA, trunks, suitcases, vanity cases, attache cases, briefcases and school satchels. See HQ 961707 (Mar. 19, 1999); HQ 953663 (May 21, 1993); HQ 953044 (April 19, 1993); and HQ 952702 (April 9, 1993).

The principle distinction between the article in issue, the "lunch tote," and the lunch boxes addressed in prior ruling letters, as previously stated, is size. The "lunch tote" is smaller, although on further examination not significantly smaller.

It is the size of the "lunch tote" that prompted a review of heading 7326, HTSUSA, and particularly subheading 7326.90.3500, HTSUSA. It should be recalled that the precise composition of the "lunch tote" has not been established. Prior to classifying the "lunch tote" in heading 7326, HTSUSA, as an article of iron or steel, the Customs Service would have undertaken a laboratory analysis.

The application of GRI 1 dictates that classification decisions begin with an examination of the headings. It is the conclusion of the Customs Service that heading 4202, HTSUSA, more specifically describes the "lunch tote" than heading 7326, HTSUSA. A review of subheading 7326.90.3500, HTSUSA, is, however, being undertaken to specifically address the classification suggested by the importer and customs broker.

Subheading 7326.90.3500, HTSUSA, provides:

7326	Other articles of iron or steel:
7326.90	Other:
7326.90.3500	Other: Containers of a kind normally carried on the person, in the pocket or in the handbag.

A review of ruling letters classifying merchandise in subheading 7326.90.3500, HTSUSA, as containers of iron or steel, normally carried on the person, in the pocket or in the handbag, revealed articles that were smaller in size than the "lunch tote" and articles whose utility was more limited or narrow. The research revealed: (1) A compact disc carrying case that measured six (6) inches by six and one-half (6-1/2) inches and was designed to carry eight compact discs, See NY E82060 (June 1, 1999); (2) Two pencil cases that measured eight (8) inches in length, three (3) inches in width and one (1) inch in height, and eight (8) inches in length and two (2) inches in width, respectively, See NY A80439 (Feb. 26, 1996) and NY E81700 (July 19, 1999); (3) A hip flask designed to hold four liquid ounces,

See NY D80042 (July 22, 1998); and (4) A pill-box shaped tin that measured one and one-half (1-1/2) inches in diameter and three-fourths (3/4) of an inch in depth, See NY C88472 (June 24, 1998).

Chapter 74 of the HTSUSA, *Cooper and Articles Thereof*, and in particular subheading 7419.99.1500, HTSUSA, were also reviewed because subheading 7419.99.1500, HTSUSA, like subheading 7326.90.3500, HTSUSA, also addresses "containers of a kind normally carried on the person, in the pocket or in the handbag." This examination was undertaken to thoroughly review rulings that might prove beneficial in understanding the phrase "containers of a kind normally carried on the person," although neither the Customs Service nor the importer suggest that the "lunch tote" is composed of copper.

The ruling letters addressing Chapter 74 containers of a kind normally carried on the person revealed: (1) A business card holder that measured two (2) inches by four (4) inches, See NY C81773 (Nov. 17, 1997); (2) A toothpick holder that measured three and one-half (3-1/2) inches in length and one-half (1/2) inch in diameter, See NY F 8382 (Mar. 24, 2000); and (3) A pillbox for which dimensions were not provided. See NY D86338 (Jan. 7, 1999).

The conclusion reached by the Customs Service is that the "lunch tote" is more analogous in size and utility to the *eo nomine* articles of heading 4202, HTSUSA, than to other articles of iron or steel of residual heading 7326, HTSUSA. The "lunch tote," although smaller than a traditional lunch box, still functions as a convenient method of transporting food and beverages in addition to having the capability of transporting other personal effects.

A New York Ruling Letter that requires distinction is NY A80887 (Mar. 13, 1996) in which a "lunch box handbag" was classified in subheading 7326.90.3500, HTSUSA, as an article of steel, tinplated, normally carried on the person. The physical dimensions of the "lunch box handbag," as set forth in the ruling letter, are similar to those of a traditional lunch box. The ruling letter additionally stated that the item was designed to resemble a lunch box.

A review of Customs Service records established that the article in issue in NY A80887 was not a lunch box but was, rather, a handbag or purse. The item was marketed as a handbag. The style of painting, the decorative and color-coordinated shoulder strap and fancy metal latches were all indicative of a handbag.

#### *Holding*

The multiple-use, metal-sided hinged container with a handle, identified as a "lunch tote," is classified in subheading 4202.19.0000, HTSUSA.

The General Column One Rate of Duty is twenty (20) percent *ad valorem*.

GAIL A. HAMILL,  
(for John Durant, Director,  
Commercial Rulings Division.)

## [ATTACHMENT C]

## DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,  
Washington, DC.CLA-2 RR:CR:TE 965554 jsj  
Category: Classification  
Tariff No. 7326.90.1000MR. DAVID M. RICKETT  
E. BESLER & COMPANY  
P.O. Box 66361  
Chicago, IL 60666-0361

Re: Revocation of HQ 961707 (Mar. 19, 1999); Lunch Box Style Metal Container; With or Without a Roughneck Thermos®; Tin-plated Iron or Steel; Set; Subheading 7326.90.1000, HTSUSA.

DEAR MR. RICKETT:

The purpose of this correspondence is to advise you that the Customs Service has reconsidered Headquarters Ruling Letter (HQ) 961707 (Mar. 19, 1999) which was issued to you as a revocation of Port Decision C85024 (Mar. 31, 1998).

Headquarters Ruling Letter 961707 classified a metal container in the shape of traditional school lunch box in subheading 4202.19.0000, HTSUSA. We have reviewed that ruling and found it to be in error. The Customs Service is reclassifying the merchandise in subheading 7326.90.1000, HTSUSA. This ruling, therefore, revokes HQ 961707.

*Facts:*

The article subject to this reconsideration is a container that has the shape of a traditional school lunch box. It measures nine (9) inches in height, seven (7) inches in length and four (4) inches in width. It is composed of metal. Customs is issuing this revocation on the assumption that the article is tin-plated. No laboratory analysis has been performed to determine its precise composition.

The item has a secured top closure and a single carrying handle. It is not insulated. Customs is advised that it may be imported with or without a ten ounce "roughneck bottle" inside. No details regarding the construction of the bottle have been provided. Customs is advised that the country of manufacture is China.

*Issue:*

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described lunch box style metal container with a handle and a latch, imported with or without a bottle?

*Law and Analysis:*

The federal agency responsible for initially interpreting and applying the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is the U.S. Customs Service.<sup>1</sup> The Customs Service, in accordance with its legislative mandate, classifies imported merchandise pursuant to the General Rules of Interpretation (GRI) and the Additional U.S. Rules of Interpretation.<sup>2</sup>

General Rule of Interpretation 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." *General Rule of Interpretation 1.* General Rule of Interpretation 1 further states that merchandise which cannot be classified in accordance with the dictates of GRI 1 should be classified pursuant to the other General Rules of Interpretation, provided the HTSUSA chapter headings or notes do not require otherwise. According to the Explanatory Notes (EN), the phrase in GRI 1, "provided such headings or notes do not otherwise

<sup>1</sup> See 19 U.S.C. 1500 (West 1999) (providing that the Customs Service is responsible for fixing the final appraisement, classification and amount of duty to be paid); See also Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 100-576, at 549 (1988) reprinted in 1988 U.S. Code Cong. and Adm. News 1547, 1582 [hereinafter Joint Explanatory Statement].

<sup>2</sup> See 19 U.S.C. 1202 (West 1999); See generally, *What Every Member of The Trade Community Should Know About: Tariff Classification*, an Informed Compliance Publication of the Customs Service available on the World Wide Web site of the Customs Service at [www.customs.gov](http://www.customs.gov), search "Importing & Exporting" and then "U.S. Customs Informed Compliance Publications."

require," is intended to "make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount." *General Rules for the Interpretation of the Harmonized System, Rule 1, Explanatory Note (V)*.

The Explanatory Notes constitute the official interpretation of the Harmonized System at the international level. See Joint Explanatory Statement *supra* note 1, at 549. The Explanatory Notes, although neither legally binding nor dispositive of classification issues, do provide commentary on the scope of each heading of the HTSUS. The EN are generally indicative of the proper interpretation of the headings. See T.D. 89-80, 54 Fed. Reg. 35127-28 (Aug. 23, 1989); *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995).

Commencing classification of the metal container in accordance with the dictates of GRI 1, the Customs Service examined the headings of Chapter 73, *Articles of Iron or Steel*, of the HTSUSA. Customs concludes the lunch box style container subject to this reconsideration is properly classified in heading 7326, HTSUSA, pursuant to GRI 1. Heading 7326, HTSUSA, more specifically than any other heading in the tariff schedule, describes the container.

Customs notes that heading 7326, HTSUSA, which covers "Other articles of iron or steel," is a residual or basket provision into which merchandise of iron or steel not described by any other heading of Chapter 73 is classified. Although the classification decision arrived at by this office relies on General Rule of Interpretation 1, this determination was made by a process of elimination, only subsequent to considering all of the other headings of Chapter 73, particularly headings 7310, HTSUSA, and 7323, HTSUSA.

Heading 7310, HTSUSA, provides for "Tanks, casks, drums, cans, boxes and similar containers, for any material (other than compressed or liquefied gas), of iron or steel, of a capacity not exceeding 300 liters, whether or not lined or heat insulated, but not fitted with mechanical or thermal equipment." The EN to heading 7310, HTSUSA, Explanatory Note 73.10, provides an illustrative list of "larger containers," as well as "smaller containers" that are properly classified in heading 7310, HTSUSA. *Explanatory Note 73.10*. The smaller containers "include boxes, cans, tins, etc." and are "mainly used as sales packings for butter, milk, beer, preserves, fruit or fruit juices, biscuits, tea, confectionery, tobacco, cigarettes, shoe cream, medicaments, etc." (Emphasis added) *Explanatory Note 73.10*.

Although the container subject to this reconsideration falls within the EN description of "boxes, cans, tins, etc.," it is not "mainly used as sales packings." *Explanatory Note 73.10*. The container in issue, although it may be used as packing for candy or other merchandise, has uses beyond sales packing. Customs will not suggest the numerous uses to which this container may be put, but is of the conclusion that this container is significantly distinct from sales packing, precluding its classification in heading 7310, HTSUSA. See generally HQ 963670 (April 12, 2002) (discussing merchandise classified in heading 7310, HTSUSA, and providing a list of precedential Customs Service ruling letters).

Heading 7323, HTSUSA, provides, in pertinent part, for the classification of "Table, kitchen or other household articles and parts thereof, of iron or steel." The Explanatory Notes to heading 7323, HTSUSA, state that this group "comprises a wide range of iron or steel articles \*\*\* used for table, kitchen or other household purposes \*\*\*." *Explanatory Note 73.23*. The EN further provides an extensive list of articles considered being for kitchen, table and other household uses. See *Explanatory Note 73.23*. Kitchen articles include items "such as saucepans, steamers \*\*\*; frying pans \*\*\*; kettles; colanders; \*\*\* jelly or pastry moulds; \*\*\* kitchen storage tins and canisters \*\*\* funnels." *Explanatory Note 73.23(A)(1)*. Articles for table use include "trays, dishes, plates \*\*\* sugar basins, butter dishes \*\*\* coffee pots \*\*\* tea pots; cups, mugs \*\*\* cruets; knife-rests; \*\*\* serviette rings, table cloth clips." *Explanatory Note 73.23(A)(2)*. Items enumerated as "other household articles" encompass articles such as "wash coppers and boilers; dustbins, buckets \*\*\* watering-cans; ash-trays; \*\*\* baskets for laundry, fruit, vegetables, etc.; letter-boxes \*\*\* luncheon boxes." *Explanatory Note 73.23(A)(3)*.

It is the conclusion of the Customs Service, subsequent to a review of this list, that the container subject to this reconsideration, a school lunch box, is not analogous to the articles enumerated in EN 73.23. Merchandise properly classified in heading 7323, HTSUSA, is limited in scope to table, kitchen or other household articles made of iron or steel. The container under review in this reconsideration may not reasonably be described as a table, kitchen or household article. See generally HQ 956218 (Aug. 23, 1994), New York Ruling Letter (NY) C88472 (June 24, 1998), NY 813291 (Aug. 23, 1995) and NY 808180 (Mar. 24, 1995). The container subject to this reconsideration may be used around the



home, but it is not designed nor specifically intended for table, kitchen or household use, precluding classification in heading 7323, HTSUSA.

It is Customs determination that the heading that is most descriptive of the lunch box container is heading 7326, HTSUSA. Heading 7326, HTSUSA, provides very simply for "Other articles of iron or steel." Heading 7326, HTSUSA, as previously stated is a residual provision and encompasses the classification of "all iron or steel articles \* \* \* other than articles included in the preceding headings of this Chapter or \* \* \* more specifically covered elsewhere in the Nomenclature." *Explanatory Note 73.26.*

Understanding that heading 7326, HTSUSA, is a residual or basket provision into which all merchandise properly classified in Chapter 73, HTSUSA, falls by default when a more descriptive heading in the chapter does not exist, the variety of iron or steel merchandise that is properly classified in heading 7326, HTSUSA, is broad. This is confirmed by a further reading of the Explanatory Notes. The Explanatory Note that corresponds to heading 7326, HTSUSA, Explanatory Note 73.26, offers an extensive listing of merchandise that is classified in heading 7326, HTSUSA.

Explanatory Note 73.26 (3) provides that heading 7326, HTSUSA, covers "Certain boxes and cases, e.g., tool boxes or cases, not specially shaped or internally fitted to contain particular tools with or without their accessories (see the Explanatory Note to heading 42.02); botanists', etc., collection or specimen cases, trinket boxes; cosmetic or powder boxes and cases; cigarette cases, tobacco boxes, cachou boxes, etc., but **not including** containers of heading 73.10, household containers (heading 73.23), nor ornaments (heading 83.06)." (Emphasis added). The container subject to this reconsideration is not easily analogized to the "boxes and cases" specifically identified in the EN, but this is not necessary. The drafters of the EN, by employing the abbreviations "e.g." and "etc." in EN 73.26, exhibited an intent that the identified articles were only intended to be representative or illustrative.

It is the conclusion of the Customs Service that the lunch box container in issue and the articles identified by example in EN 73.26 share enough common features to warrant the classification of it in heading 7326, HTSUSA. The container in issue is essentially a metal box, the size of which according to a reading of EN 73.26 may vary significantly. The container is larger than trinket and cachou boxes, but smaller than tool boxes. It is not specially shaped nor is it internally fitted. The possible uses of the container are similar to the anticipated uses of the containers referenced in the EN. It may carry a variety of items, none of which fall into any particular category that might preclude classification in heading 7326, HTSUSA. As should be appreciated, there is no single example provided for in EN 73.26 to which Customs may point as the perfect example of a container similar to the one subject to this reconsideration. Customs has, however, demonstrated that there are a significant number of common characteristics between the container in issue and the "boxes and cases" illustrated in Explanatory Note 73.26 to warrant classification in heading 7326, HTSUSA.

Although Customs has discussed the similarities between the relevant merchandise and the items identified in the Explanatory Notes to heading 7326, HTSUSA, it is important to remember that since heading 7326, HTSUSA, is a basket or residual provision it is only necessary to determine that the Thermos® merchandise is not excluded from heading 7326, HTSUSA, nor specifically provided for elsewhere in the tariff schedule. Customs concludes that the merchandise is not precluded from classification in heading 7326, HTSUSA, nor is it specifically provided for in another tariff schedule heading.

Continuing the classification of the school lunch box style container at the subheading level, the container is classified in subheading 7326.90.1000, HTSUSA. See generally NY H81764 (June 19, 2001), NY F81395 (Jan. 13, 2000) and NY B80840 (Jan. 10, 1997). Subheading 7326.90.1000, HTSUSA, provides for the classification of

7326	Other articles of iron or steel:
7326.90	Other:
7326.90.1000	Of tinsplate.

The Customs Service specifically notes for the attention of the importer and the customs broker that Customs has not undertaken a laboratory analysis to confirm that the container in issue is tin-plated. Should the container not prove to be tin-plated, this would significantly impact the classification and rate of duty of this merchandise. See HQ 965063 (April 12, 2002) (a binding classification ruling classifying similar merchandise said to be tin-plated).

Should this container not be tin-plated, it would be classified in subheading 7326.90.8586, HTSUSA. Subheading 7326.90.8586, HTSUSA, provides for:

7326           Other articles of iron or steel:

9326.90           Other:

Other:

Other:

7326.90.85           Other,

7326.90.8586           Other.

It is noted that Customs, in PD C85024 and HQ 961707, classified this item in heading 4202, HTSUSA. Heading 4202, HTSUSA, provides for the classification of:

Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly of mainly covered with such materials or with paper.

Customs, during the course of this reconsideration, determined that the merchandise in issue was not similar to the items designated by name in the first part of heading 4202, HTSUSA, that aspect which precedes the semi-colon. It was also determined that consideration of the items listed in the second part of the heading was unnecessary because those articles must be made of specific materials and iron and steel, of which the instant merchandise is composed, are not enumerated materials. Since Customs determined that the metal container imported by Thermos® is not similar to the containers designated *eo nomine* in heading 4202, HTSUSA, Customs re-examined the headings of the HTSUSA and has concluded that the lunch box style container is properly classified in heading 7326, HTSUSA.

The Customs Service, in addition to having been requested to provide a binding classification ruling for the lunch box style container, was also requested to provide a ruling on the container when imported with the "roughneck" bottle. Customs, in examining this question, considered whether the container and the bottle were a "set" pursuant to GRI 3.

An examination of GRI 3 becomes appropriate when goods are *prima facie* classifiable under two or more headings. The container is classified in heading 7326, HTSUSA, and although the ruling request did not provide sufficient information to classify the bottle, Customs will assume that the bottle is classifiable in a different heading.

Continuing with the application of General Rule of Interpretation 3, GRI 3(a) provides that the articles should be classified according to the heading which affords the most specific description, unless the multiple headings under consideration refer to only part of the materials or substances contained in goods that are mixed or composite, or to only part of "items in a set put up for retail sale." The container and the bottle are not mixed or composite goods, warranting inquiry into the issue of whether they cumulatively constitute "items in a set put up for retail sale."<sup>3</sup> *General Rule of Interpretation 3.*

The General Rules of Interpretation do not define the phrase "items in a set put up for retail sale." The Explanatory Notes do, however, offer guidance. The precise phrase in GRI 3(a) "items in a set put up for retail sale" is not addressed in the EN. The EN do, however, address a similar phrase employed in GRI 3(b). The phrase employed in GRI 3(b) and discussed in the EN is "goods put up in sets for retail sale." *General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X).* It is the conclusion of the Customs Service that the two phrases address the same issue.

Explanatory Note (X) to GRI 3(b) provides three factors to be considered when determining whether goods have been put up in sets for retail sale. The term is taken to mean goods which:

- (a) consist of at least two different articles that are, *prima facie*, classifiable in different headings \* \* \*.

<sup>3</sup> See generally, *What Every Member of The Trade Community Should Know About: Classification of Sets Under the HTS*, an Informed Compliance Publication of the Customs Service available on the World Wide Web site of the Customs Service at [www.customs.gov](http://www.customs.gov), search "Importing & Exporting" and then "U.S. Customs Informed Compliance Publications."



(b) consist of \* \* \* articles put up together to meet a particular need or carry out a specific activity; and

(c) are put up in a manner suitable for sale directly to users without repacking \* \* \*. [General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X) (a)-(c)].

A review of the HTSUSA and an examination of the container and the bottle establish that they are *prima facie* classifiable in different headings and are packaged in a manner suitable for sale directly to users. The issue that remains, the second of the three factors, is whether the articles as put up together "meet a particular need or carry out a specific activity." General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(b).

The Explanatory Notes do not define the phrase "meet a particular need or carry out a specific activity." *Id.* The EN do, however, offer examples of items put up together for sale directly to the user which constitute sets. The initial example consists of "a sandwich made of beef, with or without cheese, in a bun \* \* \* packaged with potato chips (French Fries) \* \* \*." General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(1)(a). The second example consists of items to be used together to prepare a spaghetti meal. The components include: (1) A packet of uncooked spaghetti; (2) A sachet of grated cheese; and (3) A small tin of tomato sauce, put up in a carton. See General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(1)(b). The third example is a hairdressing set. The items in this set include: (1) A pair of electric hair clippers; (2) A comb; (3) A pair of scissors; (4) A brush; (5) A towel of textile material; and (6) a leather case to store and carry the items. See General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(2). The final example of a set is a drawing kit. The drawing kit includes five items put up together in a case of plastic sheeting. The items are: (1) A ruler; (2) A disc calculator; (3) A drawing compass; (4) A pencil; and (5) A pencil-sharpener, put up in a case of plastic sheeting. See General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(3).

A review of each of the examples of sets in EN (X) indicates that components of sets share at least one common trait. See HQ 953472 (Mar. 21, 1994). The fact that the drafters of EN (X) did not explain when goods put up together "meet a particular need or carry out a specific purpose" suggests that resolution of the issue must be determined by analogy on a case-by-case basis.

The items that comprise each example of a set in EN (X) are related to one another in such a fashion that they interact together to serve a distinct purpose or function to enable a singular result to be achieved. The items in examples one and two are used in conjunction with one another to complete a sandwich meal and prepare a spaghetti meal. The articles in example three are used together for the purpose of hair grooming and the items in example four function with one another to enable the user to draw.

The Explanatory Notes, in addition to offering examples of items that constitute sets, also provides examples of collections of articles which do not function with one another to the degree necessary to establish a set. The initial accumulation of items in EN (X) consists of a can of shrimp, a can of *pate de foie*, a can of cheese, a can of sliced bacon and a can of cocktail sausages. See General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(1). The second example includes a bottle of spirits and a bottle of wine. See *id.* The items in the first example, although related to one another and usable together, do not "interact with one another so as to comprise a single dish." HQ 953472 *supra*. It was concluded in HQ 953472 that the wine and spirits example did not constitute a set because the items would not be used together for the mixing of a single drink nor be suitable for serving together on a particular occasion.<sup>4</sup> See HQ 953472 *Id.*

The issue in the instant ruling is whether the container has a nexus with the bottle such that both are intended to be used together or in conjunction with one another to meet a particular need or carry out a specific activity. It is the conclusion of the Customs Service that the metal container and the bottle will be used together or in conjunction with one another to meet a particular need or carry out a specific activity. The container provides a means of packing and transporting food and snacks and will be used with the bottle that will enable the user to store and transport a beverage. Customs understands that the food

<sup>4</sup> It should be noted that the Explanatory Notes of the Harmonized Commodity Description and Coding System are an international document that employs words, phrases and understandings which are intended to have a universal international meaning that may be different from the domestic meaning or understanding of a particular member-country or member-countries of the World Customs Organization.

and beverage will be enjoyed at the same time and the container accompanied by the bottle facilitates this enjoyment. The container and the bottle function together to further a specific activity, the storage, transportation and enjoyment of food and beverage. They are a "set" pursuant to General Rule of Interpretation 3(b). See *Generally* HQ 088134 (Sept. 22, 1989) and HQ 959305 (Sept. 20, 1996).

General rule of interpretation 3(b) additionally provides that goods put up in sets for retail sale shall be classified as if they consisted of that component of the set that gives the set its "essential character." The General Rules of Interpretation do not define the phrase "essential character," but the Explanatory Notes offer a non-exhaustive list of factors which may be considered. The factors include: (1) The nature of the component; (2) Its bulk; (3) Its quantity; (4) Its weight; (5) Its value; and (6) The role of the component in relation to the use of the goods. See *General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (VIII)*. Explanatory Note (VIII) to GRI 3(b) specifically states that the essential character of a set will "vary between different kinds of goods." *Id.*

It is the conclusion of Customs that the lunch box style container provides the set with its essential character. The role of the lunch box is more fundamental to the set than the bottle. The container enables both the food items stored in the container and the beverage stored in the bottle to be transported. The role of the lunch box container, as previously stated in HQ 961707, is paramount to the overall use of both the container and the bottle.

*Holding:*

Headquarters Ruling Letter 961707 is hereby revoked.

The tin-plated container with a hinge and a handle in the shape of a school lunch box, when imported separately, is classified in subheading 7326.90.1000, Harmonized Tariff Schedule of the United States Annotated.

The tin-plated container with a hinge and a handle in the shape of a school lunch box, when imported with the roughneck bottle, is classified as a set pursuant to General Rule of Interpretation 3(b).

The container provides the set with its essential character and the container and bottle set is classified in subheading 7326.90.1000, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty for merchandise classified in subheading 7326.90.1000, HTSUSA, is FREE.

JOHN DURANT,  
*Director,*  
*Commercial Rulings Division.*

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[ATTACHMENT D]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC.

CLA-2 RR:CR:TE 965555 jsj  
Category: Classification  
Tariff No. 7326.90.1000

MS. KATHY M. BELAS  
JAMES G. WILEY CO.  
PO. Box 90008  
Los Angeles, CA 90009-0008

Re: Revocation of HQ 964234 (April 23, 2001); "Lunch Tote"; Lunch Box Style Metal Container; Tin-plated Iron or Steel; Subheading 7326.90.1000, HTSUSA.

DEAR MS. BELAS:

The purpose of this correspondence is to advise you that the Customs Service has reconsidered Headquarters Ruling Letter (HQ) 964234 (April 23, 2001) issued to you as the customhouse broker of Dorothy Thorpe/Christmas Corner.

Headquarters Ruling Letter 964234 classified a metal container in the shape of traditional school lunch box, only smaller, in subheading 4202.19.0000, HTSUSA. We have reviewed that ruling and found it to be in error. The Customs Service is reclassifying the merchandise in subheading 7326.90.1000, HTSUSA. This ruling, therefore, revokes HQ 964234.

**Facts:**

The article subject to this reconsideration is a container that has the shape of a traditional school lunch box, only smaller. It measures seven and one-half (7-1/2) inches in length, three and one-eighth (3-1/8) inches in width and five and one-eighth (5-1/8) inches in height. It is composed of metal believed by the Customs Service to be sheet steel. The initial ruling request indicates that the item is made of tin. Customs is issuing this revocation on the assumption that the article is tin-plated. No laboratory analysis has been performed to determine its precise composition.

The item, described by the broker as a "lunch tote," has a plastic handle on top that swivels side to side. One side of the item opens and may be secured closed by a latch on the top. Attachments for a shoulder strap are located on the narrow or width sides, one and one-half (1-1/2) inches from the top. No shoulder straps accompanied the sample. It is not insulated and does not have an accompanying container or interior attachment designed to facilitate the transportation and storage of liquids. The Customs Service has not been advised of the country of manufacture.

**Issue:**

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described, tin-plated, steel container with a handle and a latch?

**Law and Analysis:**

The federal agency responsible for initially interpreting and applying the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is the U.S. Customs Service.<sup>1</sup> The Customs Service, in accordance with its legislative mandate, classifies imported merchandise pursuant to the General Rules of Interpretation (GRI) and the Additional U.S. Rules of Interpretation.<sup>2</sup>

General Rule of Interpretation 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." *General Rule of Interpretation 1*. General Rule of Interpretation 1 further states that merchandise which cannot be classified in accordance with the dictates of GRI 1 should be classified pursuant to the other General Rules of Interpretation, provided the HTSUSA chapter headings or notes do not require otherwise. According to the Explanatory Notes (EN), the phrase in GRI 1, "provided such headings or notes do not otherwise require," is intended to "make it quite clear that the terms of the headings and any relative section or chapter notes are paramount." *General Rules for the Interpretation of the Harmonized System, Rule 1, Explanatory Note (V)*.

The Explanatory Notes constitute the official interpretation of the Harmonized System at the international level. See Joint Explanatory Statement *supra* note 1, at 549. The Explanatory Notes, although neither legally binding nor dispositive of classification issues, do provide commentary on the scope of each heading of the HTSUS. The EN are generally indicative of the proper interpretation of the headings. See T.D. 89-80, 54 Fed. Reg. 35127-28 (Aug. 23, 1989); *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995).

Commencing classification of the tin-plated metal container in accordance with the dictates of GRI 1, the Customs Service examined the headings of Chapter 73, *Articles of Iron or Steel*, of the HTSUSA. Customs concludes the lunch box shaped container subject to this reconsideration is properly classified in heading 7326, HTSUSA, pursuant to GRI 1. Heading 7326, HTSUSA, more specifically than any other heading in the tariff schedule, describes the container.

<sup>1</sup> See 19 U.S.C. 1500 (West 1999) (providing that the Customs Service is responsible for fixing the final appraisement, classification and amount of duty to be paid); See also Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 100-576, at 549 (1988) reprinted in 1988 U.S. Code Cong. and Adm. News 1547, 1582 [hereinafter Joint Explanatory Statement].

<sup>2</sup> See 19 U.S.C. 1202 (West 1999); See generally, *What Every Member of The Trade Community Should Know About: Tariff Classification*, an Informed Compliance Publication of the Customs Service available on the World Wide Web site of the Customs Service at [www.customs.gov](http://www.customs.gov), search "Importing & Exporting" and then "U.S. Customs Informed Compliance Publications."

Customs notes that heading 7326, HTSUSA, which covers "Other articles of iron or steel," is a residual or basket provision into which merchandise of iron or steel not described by any other heading of Chapter 73 is classified. Although the classification decision arrived at by this office relies on General Rule of Interpretation 1, this determination was made by a process of elimination, only subsequent to considering all of the other headings of Chapter 73, particularly headings 7310, HTSUSA, and 7323, HTSUSA.

Heading 7310, HTSUSA, provides for "Tanks, casks, drums, cans, boxes and similar containers, for any material (other than compressed or liquefied gas), of iron or steel, of a capacity not exceeding 300 liters, whether or not lined or heat insulated, but not fitted with mechanical or thermal equipment." The EN to heading 7310, HTSUSA, Explanatory Note 73.10, provides an illustrative list of "larger containers," as well as "smaller containers" that are properly classified in heading 7310, HTSUSA. *Explanatory Note 73.10*. The smaller containers "include boxes, cans, tins, etc." and are "mainly used as sales packings for butter, milk, beer, preserves, fruit or fruit juices, biscuits, tea, confectionery, tobacco, cigarettes, shoe cream, medicaments, etc." *Explanatory Note 73.10*.

Although the container subject to this reconsideration falls within the EN description of "boxes, cans, tins, etc.," it is not "mainly used as sales packings." *Explanatory Note 73.10*. The container in issue, although it may be used as packing for candy or other merchandise, has uses beyond sales packing. The broker's submission that accompanied the initial ruling request indicates that the item will function as a lunch box. Customs will not suggest the numerous uses to which this container may be put, but is of the conclusion that this container is significantly distinct from sales packing, precluding its classification in heading 7310, HTSUSA. See generally HQ 963670 (April 12, 2002) (discussing merchandise classified in heading 7310, HTSUSA, and providing a list of precedential Customs Service ruling letters).

Heading 7323, HTSUSA, provides, in pertinent part, for the classification of "Table, kitchen or other household articles and parts thereof, of iron or steel." The Explanatory Notes to heading 7323, HTSUSA, state that this group "comprises a wide range of iron or steel articles \*\*\* used for table, kitchen or other household purposes \*\*\*." *Explanatory Note 73.23*. The EN further provides an extensive list of articles considered being for kitchen, table and other household uses. See *Explanatory Note 73.23*. Kitchen articles include items "such as saucepans, steamers \*\*\*; frying pans \*\*\*; kettles; colanders; \*\*\* jelly or pastry moulds; \*\*\* kitchen storage tins and canisters \*\*\* funnels." *Explanatory Note 73.23(A)(1)*. Articles for table use include "trays, dishes, plates \*\*\* sugar basins, butter dishes \*\*\* coffee pots \*\*\* tea pots; cups, mugs \*\*\* cruets; knife rests; \*\*\* serviette rings, table cloth clips." *Explanatory Note 73.23(A)(2)*. Items enumerated as "other household articles" encompass articles such as "wash coppers and boilers; dustbins; buckets \*\*\* watering cans; ash-trays; \*\*\* baskets for laundry, fruit, vegetables, etc.; letter-boxes \*\*\* luncheon boxes." *Explanatory Note 73.23(A)(3)*.

It is the conclusion of the Customs Service, subsequent to a review of this list, that the "lunch tote" container subject to this reconsideration is not analogous to the above articles. Merchandise properly classified in heading 7323, HTSUSA, is limited in scope to table, kitchen or other household articles made of iron or steel. The container under review in this reconsideration may not reasonably be described as a table, kitchen or household article. See generally HQ 956218 (Aug. 23, 1994), New York Ruling Letter (NY) C88472 (June 24, 1998), NY 813291 (Aug. 23, 1995) and NY 808180 (Mar. 24, 1995). The container subject to this reconsideration may be used around the home, but it is not designed nor specifically intended for table, kitchen or household use, precluding classification in heading 7323, HTSUSA.

It is Customs determination that the heading that is most descriptive of the lunch box style container is heading 7326, HTSUSA. Heading 7326, HTSUSA, provides very simply for "Other articles of iron or steel." Heading 7326, HTSUSA, as previously stated is a residual provision and encompasses the classification of "all iron or steel articles \*\*\* other than articles included in the preceding headings of this Chapter or \*\*\* more specifically covered elsewhere in the Nomenclature." *Explanatory Note 73.26*.

Understanding that heading 7326, HTSUSA, is a residual or basket provision into which all merchandise properly classified in Chapter 73, HTSUSA, falls by default when a more descriptive heading in the chapter does not exist, the variety of iron or steel merchandise that is properly classified in heading 7326, HTSUSA, is broad. This is confirmed by a further reading of the Explanatory Notes. The Explanatory Note that corresponds to

heading 7326, HTSUSA, Explanatory Note 73.26, offers an extensive listing of merchandise that is classified in heading 7326, HTSUSA.

Explanatory Note 73.26 (3) provides that heading 7326, HTSUSA, covers "Certain boxes and cases, *e.g.*, tool boxes or cases, not specially shaped or internally fitted to contain particular tools with or without their accessories (see the Explanatory Note to heading 42.02); botanists', *etc.*, collection or specimen cases, trinket boxes; cosmetic or powder boxes and cases; cigarette cases, tobacco boxes, cachou boxes, *etc.*, but **not including** containers of heading 73.10, household containers (heading 73.23), nor ornaments (heading 83.06)." (Emphasis added). The container subject to this reconsideration is not easily analogized to the "boxes and cases" specifically identified in the EN, but this is not necessary. The drafters of the EN, by employing the phrases abbreviated "*e.g.*" and "*etc.*" in EN 73.26, exhibited an intent that the identified articles were only intended to be representative or illustrative.

It is the conclusion of the Customs Service that the container in issue and the articles identified by example in EN 73.26 share enough common features to warrant the classification of the "lunch tote" in heading 7326, HTSUSA. The container in issue is essentially a steel box, the size of which according to a reading of EN 73.26 may vary significantly. The container is larger than trinket and cachou boxes, smaller than tool boxes, but is about the size of powder or tobacco boxes. It is not specially shaped nor is it internally fitted. The possible uses of the container are similar to the anticipated uses of the containers referenced in the EN. It may carry a variety of items, none of which fall into any particular category that might preclude classification in heading 7326, HTSUSA. As should be appreciated, there is no single example provided for in EN 73.26 to which Customs may point as the perfect example of a container similar to the one subject to this reconsideration. Customs has, however, demonstrated that there are a significant number of common characteristics between the container in issue and the "boxes and cases" illustrated in Explanatory Note 73.26 to warrant classification in heading 7326, HTSUSA.

Although Customs has discussed the similarities between the relevant merchandise and the items identified in the Explanatory Notes to heading 7326, HTSUSA, it is important to remember that since heading 7326, HTSUSA, is a basket or residual provision it is only necessary to determine that Dorothy Thorpe/Christmas Corner's merchandise is not excluded from heading 7326, HTSUSA, nor specifically provided for elsewhere in the tariff schedule. Customs concludes that the merchandise is not precluded from classification in heading 7326, HTSUSA, nor is it specifically provided for in another tariff schedule heading.

Continuing the classification of the traditional school lunch box shaped tin-plated container at the subheading level, the container is classified in subheading 7326.90.1000, HTSUSA. See generally NY H81764 (June 19, 2001), NY F81395 (Jan. 13, 2000) and NY B80840 (Jan. 10, 1997). Subheading 7326.90.1000, HTSUSA, provides for the classification of

7326	Other articles of iron or steel:
7326.90	Other:
9326.90.1000	Of tinplate.

The Customs Service specifically notes for the attention of the importer and the customs broker that Customs has not undertaken a laboratory analysis to confirm that the container in issue is tin-plated. Customs has relied on the statements of the customhouse broker indicating that the item is "made of tin" or "comprised mostly of tin." Should the container not prove to be tin-plated, this would significantly impact the classification and rate of duty of this merchandise and, additionally, bear negatively on the importer's obligation to use reasonable care in the classification, value and entry of its merchandise. See HQ 965063 (April 12, 2002) (a binding classification ruling classifying similar merchandise said to be tin-plated).

Should this container not be tin-plated, it would be classified in subheading 7326.90.8586, HTSUSA. Subheading 7326.90.8586, HTSUSA, provides for:

7326	Other articles of iron or steel:
9326.90	Other:
	Other,
	Other:
9326.90.85	Other,
7326.90.8586	Other.

Although not raised as an issue in the initial ruling request, substantially similar containers are frequently imported with edibles or other merchandise. Headquarters Ruling Letter 963670 addressed the classification of a container and other merchandise when imported together.

It is noted that Customs, in HQ 964234, initially classified this item in heading 4202, HTSUSA. Heading 4202, HTSUSA, provides for the classification of:

Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly of mainly covered with such materials or with paper.

Customs, during the course of this reconsideration, determined that the merchandise in issue was not similar to the items designated by name in the first part of heading 4202, HTSUSA, that aspect which precedes the semi-colon. It was also determined that consideration of the items listed in the second part of the heading was unnecessary because those articles must be made of specific materials and sheet steel, of which the "lunch tote" is believed to be composed, is not an enumerated material. Since Customs determined that the metal container imported by Dorothy Thorpe/Christmas Corner is not similar to the containers designated *eo nomine* in heading 4202, HTSUSA, Customs re-examined the headings of the HTSUSA and has concluded that the "lunch tote" is properly classified in heading 7326, HTSUSA.

*Holding:*

Headquarters Ruling Letter 964234 is hereby revoked.

The tin-plated container with a hinge and a handle in the shape of a school lunch box, only smaller, not designed to be used principally as sales packing nor designed as a table, kitchen or other household article, is classified in subheading 7326.90.1000, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty is FREE.

JOHN DURANT,  
Director,  
Commercial Rulings Division.



PROPOSED MODIFICATION AND REVOCATION OF RULING  
LETTERS AND REVOCATION OF TREATMENT RELATING  
TO TARIFF CLASSIFICATION OF BRIDAL HEADPIECE  
MERCHANDISE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification and revocation of eighteen ruling letters and revocation of treatment relating to the tariff classification of bridal headpieces.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify and revoke eighteen ruling letters relating to the tariff classification of bridal headpiece merchandise under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise.

DATE: Comments must be received on or before July 19, 2002.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Teresa Frazier, Textile Branch (202) 927-2511.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**". These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise,



and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify and revoke eighteen ruling letters relating to the classification of bridal headpiece merchandise. Although in this notice Customs is specifically referring to eighteen New York Ruling Letters listed in the table below, this notice covers any rulings on such merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the issues subject to this notice, should advise Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during the notice period. An importer's failure to advise Customs of the substantially identical transactions or of a specific ruling not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

Customs has issued at least 18 rulings classifying bridal headpieces in at least 10 different subheadings throughout the tariff. There appears to be no clear, consistent method for the classification of these articles. At the urging of the National Commodity Specialist Division, Customs recently reexamined the rulings on bridal headpieces and determined that a more reasoned and simplified approach to the classification of these articles exists as set forth in proposed rulings HQ 963885, HQ 963889 and HQ 963902. Accordingly, we intend to modify and revoke the eighteen rulings as appropriate, as we find that the merchandise contained therein is classifiable as bridal headpieces within subheading 9615.19, HTSUSA, as combs, hair-slides or the like of materials other than of hard rubber or plastics.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify and revoke eighteen rulings (*see* Attachments "A" to "R" to this document) and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ

963885, HQ 963889 and HQ 963902 (see Attachments "S" to "U" to this document).

Additionally, pursuant to 19 U.S.C. 1625(c) (2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: June 3, 2002.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.

[Attachments]

<i>Ruling Number</i>	<i>Issue Date</i>	<i>Type of Customs Action</i>	<i>Style # of merchandise</i>	<i>Correct HTSUSA Classification</i>
NY B86926	7/3/97	Revocation	CB 632	9615.19.6000
NY B86924	7/3/97	Revocation	AB-609	9615.19.6000
NY B87108	7/3/97	Modification	TR-615 (item 2) and CR-625	9615.19.6000
NY B86777	7/8/97	Modification	AB-707RP/IV (item 3) and VB-652 (item 4)	9615.19.6000
NY B88340	8/27/97	Modification	CR-777 and CR-702 (items 1 & 2)	9615.19.6000
NY B88339	8/27/97	Modification	CR-770 (item 5)	9615.19.6000
NY B88327	8/27/97	Modification	BA-757(item 3) and HC-631 (item 5)	9615.19.6000
NY B88333	8/27/97	Modification	AB-766	9615.19.6000
NY B88330	9/8/97	Revocation	HW-817	9615.19.6000
NY B88332	9/8/97	Modification	AB-752, AB-762, FH-794 and CR-751	9615.19.6000
NY B88334	9/8/97	Modification	VB-816, VB-834, VB-807 and CA-803	9615.19.6000
NY B88335	9/8/97	Modification	CR-633, WR-758, VB-764  SP-763	9615.19.6000 (not including SP 763);  9615.19.2000 9615.19.4000 (depending on value of comb)
NY B88336	9/8/97	Modification	TR-820, HC-811 and CR-836	9615.19.6000
NY B88337	9/8/97	Modification	TR-714, BA-618, AB-701, CR-729	9615.19.6000

<i>Ruling Number</i>	<i>Issue Date</i>	<i>Type of Customs Action</i>	<i>Style # of merchandise</i>	<i>Correct HTSUSA Classification</i>
NY B88341	9/8/97	Modification	AB-822, AB-813, CR-801, TR-832	9615.19.6000
NY B88338	9/9/97	Modification	FH-847, BP-821, CR-828, FH-846 and HC-830	9615.19.6000
NY E86508	9/2/99	Modification	B-8851MBE-IV	9615.19.2000, 9615.19.4000 (depending on value of comb)
NY A86037	4/15/96	Revocation	AK-7022ASO and K-8911PK/WH	9615.19.6000

## [ATTACHMENT A]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
New York, NY, July 3, 1997.

CLA-2-96:RR:NC:SP:233 B86926  
Category: Classification  
Tariff No. 6217.10.9530

MS. MONQUUNCIE AKINS  
CIRCLE INTERNATIONAL, INC.  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of a bridal headpiece from China.

DEAR MS. AKINS:

In your letter dated June 17, 1997, on behalf of Bridal Original, you requested a tariff classification ruling.

The submitted sample, style no. CB 632, is a textile covered headpiece. The headpiece is circular in shape and is decorated with a large textile bow, plastic pearls, sequins and lace. Two small plastic combs are attached to the sides of the headpiece for securing the item to the hair. After the headpiece is imported into the United States, a veil will be attached to it, forming a complete bridal veil.

The applicable subheading for the bridal headpiece will be 6217.10.9530, Harmonized Tariff Schedule of the United States (HTS), which provides for Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other, Other: Of man-made fibers. The rate of duty will be 15.2% ad valorem.

The bridal headpiece falls within textile category designation 659. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions

regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-466-5739.

GWENN KLEIN KIRSCHNER,  
*Chief, Special Products Branch,  
National Commodity Specialist Division.*

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[ATTACHMENT B]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
New York, NY, July 3, 1997.  
CLA-2-96:RR:NC:SP:233 B86924  
Category: Classification  
Tariff No. 6702.90.3500

MS. MONQUINCIE AKINS  
CIRCLE INTERNATIONAL, INC.  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of a bridal headpiece from China.

DEAR MS. AKINS:

In your letter dated June 17, 1997, on behalf of Bridal Original, you requested a tariff classification ruling.

The submitted sample, style no. AB-609, is a man-made fiber textile covered headpiece. The headpiece, which is semi-rigid and semicircular in shape, is decorated with plastic pearls and textile flowers and leaves. After the headpiece is imported into the United States, a veil will be attached to it, forming a complete bridal veil. The essential character of the item is imparted by the man-made fiber flowers.

The applicable subheading for the bridal headpiece will be 6702.90.3500, Harmonized Tariff Schedule of the United States (HTS), which provides for Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers. The rate of duty will be 9% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-466-5739.

GWENN KLEIN KIRSCHNER,  
*Chief, Special Products Branch,  
National Commodity Specialist Division.*

## [ATTACHMENT C]

## DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

New York, NY, July 3, 1997.

CLA-2-96:RR:NC:SP:233 B87108

Category: Classification

Tariff No. 9615.19.6000,

3926.20.9050, and 6117.80.9540

MS. MONQUINCIE AKINS  
CIRCLE INTERNATIONAL, INC.  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of bridal headpieces from China.

DEAR MS. AKINS:

In your letter dated June 17, 1997, on behalf of Bridal Original, you requested a tariff classification ruling.

You have submitted the following samples with your request:

1. Style no. HB-623 is a semicircular-shaped headpiece. It is covered with a textile fabric. The fabric is decorated with rows of plastic pearls and rhinestone studded plastic pearls. A small comb is attached to the underside of the headpiece for securing the item to the hair.

2. Style no. TR-615 is a circular-shaped headpiece. The front portion of the headpiece is decorated with plastic pearls and beads strung and shaped in arcs, giving the appearance of a crown or tiara. The back portion is decorated with textile flowers and plastic pearls and beads strung on nylon threads. A small comb is attached to the underside of the headpiece for securing the item to the hair.

3. Style no. BP-621 is an arc-shaped headpiece. It is decorated with three large textile flowers, textile leaves, plastic pearls and rhinestones. A small comb is attached to the underside of the headpiece for securing the item to the hair.

4. Style no. BP-605 is an arc-shaped headpiece. It is decorated with three large textile flowers, textile leaves, rhinestones and plastic pearls, beads and textile flowers strung on nylon threads. A small comb is attached to the underside of the headpiece for securing the item to the hair.

5. Style no. CR-625 is a circular-shaped headpiece. The front portion of the headpiece is decorated with rows of beaded lace, intertwined with plastic pearls and beads strung and shaped in arcs, giving the appearance of a crown or tiara. The back portion is decorated with textile flowers along with plastic pearls and beads strung on nylon threads. A small comb is attached to the underside of the headpiece for securing the item to the hair.

After the headpieces are imported into the United States, veils will be attached to them, forming complete bridal veils.

The applicable subheading for the bridal headpieces Styles no. HB-623, BP-621 and BP-605 (items 1, 3 and 4) will be 9615.19.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for Combs, hair-slides and the like: Other: Other. The rate of duty will be 11% ad valorem.

The applicable subheading for the bridal headpiece Style no. TR-615 (item 2) will be 3926.20.9050, HTS, which provides for Other articles of plastics and articles of other materials of headings 3901 to 3914: Articles of apparel and clothing accessories (including gloves): Other: Other. The rate of duty will be 5% ad valorem.

The applicable subheading for the bridal headpiece Style no. CR-625 will be 6117.80.9540, HTS, which provides for Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other, Other: Of man-made fibers: Other. The rate of duty will be 15.2% ad valorem.

The bridal headpieces which are classified under subheading 6117.80.9540 fall within textile category designation 659. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas

(Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-466-5739.

GWENN KLEIN KIRSCHNER,  
Chief, Special Products Branch,  
National Commodity Specialist Division.

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[ATTACHMENT D]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,  
New York, NY, July 8, 1997.

CLA-2-96:RR:NC:SP:233 B86777

Category: Classification

Tariff No. 9615.19.6000,

6702.90.3500, and 3926.20.9050

MS. MONQUNCIE AKINS  
CIRCLE INTERNATIONAL, INC.  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of bridal headpieces from China.

DEAR MS. AKINS:

In your letter dated June 17, 1997, on behalf of Bridal Original, you requested a tariff classification ruling.

You have submitted the following samples with your request:

1. Style no. BP-7211V is an arc-shaped headpiece. It is decorated with three textile flowers, textile leaves, and plastic pearls, beads and small textile flowers strung on nylon threads. A small comb is attached to the underside of the headpiece for securing the item to the hair.

2. Style no. SP-705IV is an arc-shaped headpiece. It is decorated with clusters of textile flowers, textile leaves, and plastic pearls and beads strung on nylon threads. A small comb is attached to the underside of the headpiece for securing the item to the hair.

3. Style no. AB-707RP/IV is a semicircular-shaped headpiece. It is decorated with man-made fiber textile flowers and leaves, and plastic pearls strung on nylon threads. A small comb is attached to the underside of the headpiece for securing the item to the hair. The essential character of this item is imparted by the textile flowers.

4. Style no. VB-652 is a circular-shaped headpiece. It is decorated with two large textile flowers, textile leaves covered with plastic pearls, plastic pearls strung on nylon threads, and plastic pearls strung around the frame. The frame is semi-rigid in construction.

5. Style no. AB-616 is a semicircular-shaped headpiece. It is decorated with textile flowers and leaves, and plastic pearls. A small comb is attached to the underside of the headpiece for securing the item to the hair.

After the headpieces are imported into the United States, veils will be attached to them, forming complete bridal veils.

The applicable subheading for the bridal headpieces Styles no. BP-7211V, SP-705IV and AB-616 (items 1, 2 and 5) will be 9615.19.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for Combs, hair-slides and the like: Other: Other. The rate of duty will be 11% ad valorem.

The applicable subheading for the bridal headpiece Style no. AB-707RP/IV (item 3) will be 6702.90.3500, HTS, which provides for Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers. The rate of duty will be 9% ad valorem.

The applicable subheading for the bridal headpiece Style no. VB-652 (item 4) will be 3926.20.9050, HTS, which provides for Other articles of plastics and articles of other materials of headings 3901 to 3914: Articles of apparel and clothing accessories (including gloves): Other: Other, Other. The rate of duty will be 5% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-466-5739.

GWENN KLEIN KIRSCHNER,  
Chief, Special Products Branch,  
National Commodity Specialist Division.

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[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
New York, NY, August 27, 1997.  
CLA-2-96:RR:NC:SP:233 B88340  
Category: Classification  
Tariff No. 9615.19.6000 and 3926.20.9050

Ms. KIMBERLY CARTER  
CIRCLE INTERNATIONAL, INC.  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of bridal headpieces from China.

DEAR Ms. CARTER:

In your letter dated August 1, 1997, on behalf of Bridal Originals, you requested a tariff classification ruling.

You have submitted the following samples with your request:

1. Style no. CR-777 is a circular-shaped headpiece. The front portion of the headpiece is decorated with plastic pearls and plastic beads sewn onto textile fabric flowers. A small comb is attached to the underside of the headpiece for securing the item to the hair. The essential character of the item is imparted by the plastic pearls and beads.

2. Style no. CR-702 is a circular-shaped headpiece. The front portion of the headpiece is covered with a textile fabric. The fabric is decorated with various sized plastic pearls, strung and shaped in patterns of flowers, covering the entire surface. A small comb is attached to the underside of the headpiece for securing the item to the hair. The essential character of the item is imparted by the plastic pearls.

3. Style no. CA-775 is an arc-shaped headpiece. It is decorated with white textile fabric flowers, plastic pearls and plastic beads. A comb is attached to the underside of the headpiece for securing the item to the hair.

4. Style no. BP-718 is an arc-shaped headpiece. It is decorated with various sized plastic pearls which are strung and shaped in floral and loop patterns. A comb is attached to the underside of the headpiece for securing the item to the hair.

5. Style no. SP-810 is a semicircular-shaped headpiece. It is covered with a white textile fabric. The entire outer surface of the headpiece is decorated with plastic pearls. A small comb is attached to the underside of the headpiece for securing the item to the hair.

After the headpieces are imported into the United States, veils will be attached to them, forming complete bridal veils.

The applicable subheading for bridal headpieces Styles no. CA-775, BP-718 and HB-706 (items 3, 4, and 5) will be 9615.19.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for Combs, hair-slides and the like: Other: Other. The rate of duty will be 11% ad valorem.

The applicable subheading for bridal headpieces Styles no. CR-777 and CR-702 (items 1 and 2) will be 3926.20.9050, HTS, which provides for Other articles of plastics and articles



of other materials of headings 3901 to 3914: Articles of apparel and clothing accessories (including gloves): Other: Other, Other. The rate of duty will be 5% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-466-5739.

GWENN KLEIN KIRSCHNER,  
Chief, Special Products Branch,  
National Commodity Specialist Division.

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[ATTACHMENT F]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
New York, NY, August 27, 1997.  
CLA-2-96:RR:NC:SP:233 B88339  
Category: Classification  
Tariff No. 9615.19.6000 and 6217.10.9530

MS. KIMBERLY CARTER  
CIRCLE INTERNATIONAL, INC.  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of bridal headpieces from China.

DEAR MS. CARTER:

In your letter dated August 1, 1997, on behalf of Bridal Originals, you requested a tariff classification ruling.

You have submitted the following samples with your request:

1. Style no. CR-767 is an arc-shaped headpiece. It is decorated with three large flowers made of small plastic pearls, trimmed with sequins and plastic pearls. A small comb is attached to the underside of the headpiece for securing the item to the hair.
2. Style no. SP-753 is an arc-shaped headpiece. It is decorated with seven ivory colored textile flowers trimmed with small plastic pearls, plastic pearls strung and shaped like leaves, and textile flowers and plastic pearls strung on nylon threads. A small comb is attached to the underside of the headpiece for securing the item to the hair.
3. Style no. FH-793 is a circular-shaped headpiece. The front portion of the headpiece is decorated with plastic pearls and beads strung and shaped in arcs, giving the appearance of a crown or tiara. A small comb is attached to the underside of the headpiece for securing the item to the hair.
4. Style no. HB-761 is a semicircular-shaped headpiece. It is covered with a white textile fabric. The fabric is decorated entirely with sequins and various sized plastic pearls. A cluster of sequins and plastic pearls is formed at the top, with leaves cascading down both sides. A small comb is attached to the underside of the headpiece for securing the item to the hair.
5. Style no. CR-770 is a circular-shaped headpiece. The front portion is decorated with white textile components and small plastic pearls. The narrower back portion of the headpiece is covered with small plastic pearls strung on nylon thread, woven with strips of textile fabric. A small comb is attached to the underside of the headpiece for securing the item to the hair.

After the headpieces are imported into the United States, veils will be attached to them, forming complete bridal veils.

The applicable subheading for bridal headpieces Styles no. CR-767, SP-753, FH-793 and HB-761 (items 1, 2, 3 and 4) will be 9615.19.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for Combs, hair-slides and the like: Other: Other. The rate of duty will be 11% ad valorem.

The applicable subheading for bridal headpiece Style no. CR-770 (item 5) will be 6217.10.9530, HTS, which provides for Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other, Other: Of man-made fibers. The rate of duty will be 15.2% ad valorem.

Bridal headpiece Style no. CR-770 falls within textile category designation 659. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-466-5739.

GWENN KLEIN KIRSCHNER,  
Chief, Special Products Branch,  
National Commodity Specialist Division.

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[ATTACHMENT G]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
New York, NY, August 27, 1997.  
CLA-2-96:RR:NC:SP:233 B88327  
Category: Classification  
Tariff No. 9615.19.6000,  
6702.90.3500, and 3926.20.9050

MS. KIMBERLY CARTER  
CIRCLE INTERNATIONAL, INC.  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of bridal headpieces from China.

DEAR MS. CARTER:

In your letter dated August 1, 1997, on behalf of Bridal Originals, you requested a tariff classification ruling.

You have submitted the following samples with your request:

1. Style no. BP-725 is an arc-shaped headpiece. It is decorated with three large pink colored textile flowers with ivory colored textile rosettes at the center of each, and small plastic pearls. A small comb is attached to the underside of the headpiece for securing the item to the hair.

2. Style number HB-723 is a semicircular-shaped headpiece. It is covered with a white textile fabric. White textile flowers and small plastic pearls surround the headpiece. A small comb is attached to the underside of the headpiece for securing the item to the hair.

3. Style no. BA-757 is an arc-shaped headpiece. It is decorated with white textile flowers and leaves, sequins and small plastic pearls strung on nylon thread. A small comb is attached to the underside of the headpiece for securing the item to the hair.

4. Style no. HB-628 is a semicircular-shaped headpiece. It is covered with an ivory colored textile fabric. The fabric is decorated with sequins, plastic beads, plastic pearls strung and shaped like flowers and leaves, and textile leaves. A small comb is attached to the underside of the headpiece for securing the item to the hair.

5. Style no. HC-631 is a circular-shaped headpiece. It is decorated with plastic pearls strung and shaped like flowers and white textile flowers and leaves. Two small combs are attached to the underside of front of the headpiece for securing the item to the hair. The essential character of the item is imparted by the plastic pearls.

After the headpieces are imported into the United States, veils will be attached to them, forming complete bridal veils.

The applicable subheading for bridal headpieces Styles no. BP-725, HB-723 and HB-628 (items 1, 2 and 4) will be 9615.19.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for Combs, hair-slides and the like: Other: Other. The rate of duty will be 11% ad valorem.

The applicable subheading for bridal headpiece Style no. BA-757 (item 3) will be 6702.90.3500, HTS, which provides for Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers. The rate of duty will be 9% ad valorem.

The applicable subheading for bridal headpiece Style no. HC-631 (item 5) will be 3926.20.9050, HTS, which provides for Other articles of plastics and articles of other materials of headings 3901 to 3914: Articles of apparel and clothing accessories (including gloves): Other: Other. The rate of duty will be 5% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-466-5739.

GWENN KLEIN KIRSCHNER,  
Chief, Special Products Branch,  
National Commodity Specialist Division.

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[ATTACHMENT H]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
New York, NY, August 27, 1997.  
CLA-2-96:RR:NC:SP:233 B88333  
Category: Classification  
Tariff No. 9615.19.6000 and 6217.10.9530

MS. KIMBERLY CARTER  
CIRCLE INTERNATIONAL, INC.  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of bridal headpieces from China.

DEAR MS. CARTER:

In your letter dated August 1, 1997, on behalf of Bridal Originals, you requested a tariff classification ruling.

You have submitted the following samples with your request:

1. Style no. AB-766 is a semicircular-shaped headpiece. It is decorated with ivory colored textile components and plastic pearls strung and shaped in arcs. The essential character of the item is imparted by the textile components.

2. Style no. FH-747 is an arc-shaped headpiece. It is decorated with three large white textile flowers surrounded by smaller white textile flowers, and plastic pearls strung and attached in loops. A small comb is attached to the underside of the headpiece for securing the item to the hair.

3. Style no. FH-746 is a semicircular-shaped headpiece. It is covered with a pink textile fabric. The fabric is decorated with small plastic pearls and one pink and ivory colored textile flower.

4. Style no. BP-759 is an arc-shaped headpiece. It is decorated with three large ivory colored textile flowers, rhinestones and plastic pearls. A small comb is attached to the underside of the headpiece for securing the item to the hair.

5. Style no. FH-795 is a semicircular-shaped headpiece. It is covered with a white textile fabric. The fabric is decorated with small plastic pearls and one white textile flower.

After the headpieces are imported into the United States, veils will be attached to them, forming complete bridal veils.

The applicable subheading for bridal headpieces Styles no. FH-747, FH-746, BP-759 and FH-795 (items 2, 3, 4 and 5) will be 9615.19.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for Combs, hair-slides and the like: Other: Other. The rate of duty will be 11% ad valorem.

The applicable subheading for bridal headpiece Style no. AB-766 (item 1) will be 6217.10.9530, Harmonized Tariff Schedule of the United States (HTS), which provides for Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other: Of man-made fibers. The rate of duty will be 15.2% ad valorem.

The bridal headpiece which is classified under subheading 6217.10.9530 falls within textile category designation 659. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-466-5739.

GWENN KLEIN KIRSCHNER,  
Chief, Special Products Branch,  
National Commodity Specialist Division.

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[ATTACHMENT I]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
New York, NY, September 8, 1997.  
CLA-2-62:RR:NC:WA:353 B88330  
Category: Classification  
Tariff No. 6217.10.9530

MS. KIMBERLY CARTER  
CIRCLE INTERNATIONAL  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of a Bridal headpiece from Hong Kong.

DEAR MS. CARTER:

In your letter dated August 1, 1997, received in our office on August 4, 1997, you requested a classification ruling on behalf of your client Bridal Originals. A sample was submitted for review.

The submitted sample, **Style HW-817** is stated to be a man-made fabric covered head piece which after arriving in the United States will be combined with a veil to make a wedding veil. The item is a circular double wire frame approximately 7/8 inch wide with a diameter of approximately 6 inches with an outer surface of netting. Elastic loops are placed inside this wire frame where a small comb will be placed to affix the headpiece to the hair of the wearer. On to this outer netting surface is affixed a band of woven textile decorations of man-made fiber that resemble bows and lace circles.

The applicable subheading for the **Style HW-817** will be 6217.10.9530 Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other: Of man-made fibers". The rate of duty will be 15.2 percent ad valorem.

**Style HW-817** falls within textile category designation 659. Based upon international textile trade agreements products of Hong Kong are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at (212) 466-5739.

PAUL K. SCHWARTZ,  
Chief, Textile & Apparel Branch,  
National Commodity Specialist Division.

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[ATTACHMENT J]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
New York, NY, September 8, 1997.  
CLA-2-62:RR:NC:WA:353 B88332  
Category: Classification  
Tariff No. 3926.90.3500,  
6702.90.3500, and 9615.19.6000

Ms. KIMBERLY CARTER  
CIRCLE INTERNATIONAL  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of Bridal headpieces from Hong Kong.

DEAR Ms. CARTER:

In your letter dated August 1, 1997, received in our office on August 4, 1997, you requested a classification ruling on behalf of your client Bridal Originals. Samples were submitted for review.

The submitted samples, **AB-752, AB-762, CR-751, FH-794 and FH-792** are stated to be fabric covered metal framed headpieces which after arriving into the United States will be combined with a veil to made wedding veils.

**Styles AB-752, AB-762 and FH-794** are circular headpieces worn as a wreath on top of the head. They are constructed of primarily textile components with plastic beads which have their essential character imparted by the textile components that resemble flowers.

**Style CR-751** is a circular headpiece with a crown of decorative plastic pearls. The beads are affixed to a stiffened netted fabric backing that is reinforced with a wire frame. The plastic pearls impart the essential character to this item.

**Style FH-792** is a rigid horseshoe headband for holding the hair in place that is covered with man-made textile flowers and ribbon bows.

The applicable subheading for **Style CR-751** will be 3926.90.3500, Harmonized Tariff Schedule of the United States (HTS) which provides for "Other articles of plastics and ar-

ticles of other materials of headings 3901 to 3914: Other: Beads, bugles and spangles, not strung (except temporarily) and not set; articles thereof, not elsewhere specified or included: Other". The rate of duty will be 6.6 percent ad valorem.

The applicable subheading for **Styles AB-752, AB-762 and FH-794** will be 6702.90.3500, HTS, which provides for "Artificial flowers, foliage fruits and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers". The rate of duty will be 9 percent ad valorem.

The applicable subheading for **Style FH-792** will be 9615.19.6000, HTS, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other". The rate of duty will be 11 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Martin Weiss at 212-466-5881.

PAUL K. SCHWARTZ  
Chief, Textile & Apparel Branch,  
National Commodity Specialist Division.

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[ATTACHMENT K]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE  
New York, NY, September 8, 1997.  
CLA-2-62:RR:NC:WA:353 B88334  
Category: Classification  
Tariff No. 6217.10.9530, 6702.10.2000,  
6702.90.3500, and 9615.19.6000

MS. KIMBERLY CARTER  
CIRCLE INTERNATIONAL  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of Bridal headpieces from Hong Kong.

Dear Ms. CARTER:

In your letter dated August 1, 1997, received in our office on August 4, 1997, you requested a classification ruling on behalf of your client Bridal Originals. Samples were submitted for review.

The submitted samples, **SP-831, VB-807, VB-816, CA-803 and VB-834** are stated to be fabric covered metal framed headpieces which after arriving into the United States will be combined with a veil to make wedding veils.

**Styles VB-816 and VB-834** are circular headpieces worn on top of the head like a wreath and are constructed of man-made woven textile components that resemble flowers. **Style VB-807** is a circular headpiece worn on top of the head made up of beaded components that resemble flowers.

**Style SP-831** is a sprig that is approximately 3-1/2 inches long, made up of textile components that resemble flowers and has elastic loops on the inside to accommodate a comb. The article is principally used as a hair ornament.

**Style CA-803** is a semi-circular headpiece that is made up of three 3/8 inch narrow textile bands decorated with textile in a figure eight pattern and mounted on top of a 2 inch high frame with a textile crisscross pattern. Atop this frame is a grouping of textile component that resemble artificial flowers. We believe that the 2 inch high frame imparts the essential character because of its more prominent appearance.

The applicable subheading for **styles VB-816 and VB-834** will be 6702.90.3500, HTS, which provides for: "Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers". The rate of duty will be 9 percent ad valorem.

The applicable subheading for **style VB-807** will be 6702.10.2000, HTS, which provides for "Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of plastics: Assembled by binding with flexible materials such as wire, paper, textile materials, or foil, or by gluing or by similar methods". The rate of duty will be 8.4 percent ad valorem.

The applicable subheading for **Style SP-831** will be 9615.19.6000, HTS, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other". The rate of duty will be 11 percent ad valorem.

The applicable subheading for **Style CA-803** will be 6217.10.9530, HTS, which provides for "other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other: Of man-made fibers". The rate of duty will be 15.2 percent ad valorem.

**Style CA-803** falls within textile category designation 659. Based upon international textile trade agreements products of Hong Kong are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Martin Weiss at 212-466-5881.

PAUL K. SCHWARTZ

Chief, Textile & Apparel Branch,  
National Commodity Specialist Division.

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[ATTACHMENT L]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

New York, NY, September 8, 1997.

CLA-2-62:RR:NC:WA:353 B88335

Category: Classification

Tariff No. 6702.10.2000,

6702.90.3500, and 9615.19.6000

MS. KIMBERLY CARTER  
CIRCLE INTERNATIONAL  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of Bridal headpieces from Hong Kong.

DEAR MS. CARTER:

In your letter dated August 1, 1997, received in our office on August 4, 1997, you requested a classification ruling on behalf of your client Bridal Originals. Samples were submitted for review.

The submitted samples, **WR-758, SP-763, HB-814, VB-764 and CR-633** are stated to be fabric covered metal framed headpieces which after arriving into the United States will be combined with a veil to made wedding veils.

**Style WR-758 and VB-764** are circular headpieces worn on top of the head like a wreath and are constructed of man-made woven textile components that resemble flowers.



**Style CR-633** is a circular headpiece of decorative plastic beads and sequins which have their essential character imparted by the plastic components that resemble flowers.

**Style FH-792** is a rigid horseshoe headband for holding the hair in place that is covered with man-made textile decorative shapes with beaded accents.

**Style SP-763** is fashioned like a sprig decorated with flower-like textile adornments and leaves made up of beads and sequins on a stiffened textile backing. A comb is attached at the rear. While a veil can be attached to this item it is principally used as a hair ornament and to hold the hair in place.

The applicable subheading for **style CR-633** will be 6702.10.2000, HTS, which provides for "Artificial flowers, foliage fruits and parts thereof; articles made of artificial flowers, foliage or fruit: Of plastics: Assembled by binding with flexible materials such as wire, paper, textile materials, or foil, or by gluing or by similar methods." The rate of duty will be 8.4 percent ad valorem.

The applicable subheading for **styles WR-758 and VB-764** will be 6702.90.3500, HTS, which provides for "Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers". The rate of duty will be 9 percent ad valorem.

The applicable subheading for **Styles SP-763 and HB-814** will be 9615.19.6000, HTS, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other". The rate of duty will be 11 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Martin Weiss at 212-466-5881.

PAUL K. SCHWARTZ

Chief, Textile & Apparel Branch,  
National Commodity Specialist Division.

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[ATTACHMENT M]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

New York, NY, September 8, 1997.

CLA-2-62:RR:NC:WA:353 B88336

Category: Classification

Tariff No. 3926.90.3500, 6217.10.9530,

6702.90.3500, and 9615.19.6000

MS. KIMBERLY CARTER  
CIRCLE INTERNATIONAL  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of Bridal headpieces from Hong Kong.

DEAR MS. CARTER:

In your letter dated August 1, 1997, received in our office on August 4, 1997, you requested a classification ruling on behalf of your client Bridal Originals. Samples were submitted for review.

The submitted samples, **TR-820, HC-811, BP-835, CR-836 and BP-815** are stated to be fabric covered metal framed headpieces which after arriving into the United States will be combined with a veil to make wedding veils.

**Style HC-811** is a circular headpiece worn on top of the head like a wreath and is constructed of a front crown man-made woven textile components that resemble flowers. The back part of the headpiece is covered with inter-twining glass beads and plastic pearls. We believe that the front crown of textile components that resemble flowers imparts the essential character to this article as this is most prominent when the headpiece is worn.

**Style CR-836** is a circular headpiece made up textile covered concentric wire loops that form the crown of the article. There are three textile ornaments that resemble small flowers at the bottom of the crown. The textile components impart the essential character to the article.

**Style TR-820** is a circular headpiece made up of decorative plastic pearls, beads and glass rhinestones that form the crown of the article. The plastic beads and pearls impart the essential character to this item.

**Styles BP-835 and BP-815** are both straight pieces, approximately 5½ inches wide that feature at the rear an attached comb with a pile strip to accommodate a veil with velcro. Although these articles can be used with a veil we believe that its principal use will be as a hair ornament and to hold the hair in place.

The applicable subheading for **Style TR-820** will be 3926.90.3500, Harmonized Tariff Schedule of the United States (HTS) which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Beads, bugles and spangles, not strung (except temporarily) and not set; articles thereof, not elsewhere specified or included: Other". The rate of duty will be 6.6 percent ad valorem.

The applicable subheading for **HC-811** will be 6702.90.3500, HTS, which provides for: "Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers". The rate of duty will be 9 percent ad valorem.

The applicable subheading for **Styles BP-835 and BP-815** will be 9615.19.6000, HTS, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other". The rate of duty will be 11 percent ad valorem.

The applicable subheading for **Style CR-836** will be 6217.10.9530, HTS, which provides for "other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other: Of man-made fibers". The rate of duty will be 15.2 percent ad valorem.

**Style CR-836** falls within textile category designation 659. Based upon international textile trade agreements products of Hong Kong are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Martin Weiss at 212-466-5881.

PAUL K. SCHWARTZ

Chief, Textile & Apparel Branch,  
National Commodity Specialist Division.

## [ATTACHMENT N]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
New York, NY, September 8, 1997.  
CLA-2-62:RR:NC:WA:353 B88337  
Category: Classification  
Tariff No. 3926.90.3500, 6217.10.9530,  
6702.90.3500, and 9615.19.6000

MS. KIMBERLY CARTER  
CIRCLE INTERNATIONAL  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of Bridal headpieces from Hong Kong.

DEAR MS. CARTER:

In your letter dated August 1, 1997, received in our office on August 4, 1997, you requested a classification ruling on behalf of your client Bridal Originals. Samples were submitted for review.

The submitted samples, **TR-714**, **BA-618**, **CR-729**, **AB-701** and **HB-709** stated to be fabric covered metal framed headpieces which after arriving into the United States will be combined with a veil to make wedding veils.

**Style AB-701** and **BA-618** are semi-circular headpiece worn on top of the head like a wreath and is constructed of man-made woven textile components that resemble flowers.

**Style CR-729** is a semi-circular headpiece made up of three layered overlapping woven man-made textile pointed ovals with a row of plastic pearls at the bottom and other plastic pearls dispersed throughout the item. The textile components impart the essential character to the article.

**Style TR-714** is a circular headpiece made up of decorative plastic beads in the shape of intertwined strands of pearls. The plastic beads impart the essential character to this item.

**Style HB-709** is a rigid horseshoe headband for holding the hair in place that is covered with man-made textile like flowers and intertwined narrow textile loops with plastic beads in the center of the loops.

The applicable subheading for **Style TR-714** will be 3926.90.3500, Harmonized Tariff Schedule of the United States (HTS) which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Beads, bugles and spangles, not strung (except temporarily) and not set; articles thereof, not elsewhere specified or included: Other". The rate of duty will be 6.6 percent ad valorem.

The applicable subheading for **styles BA-618** and **AB-701** will be 6702.90.3500, HTS, which provides for: "Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers". The rate of duty will be 9 percent ad valorem.

The applicable subheading for **Style HB-709** will be 9615.19.6000, HTS, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other". The rate of duty will be 11 percent ad valorem.

The applicable subheading for **Style CR-729** will be 6217.10.9530, HTS, which provides for "other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other: Of man-made fibers". The rate of duty will be 15.2 percent ad valorem.

**Style CR-729** falls within textile category designation 659. Based upon international textile trade agreements products of Hong Kong are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Martin Weiss at 212-466-5881.

PAUL K. SCHWARTZ

Chief, Textile & Apparel Branch,  
National Commodity Specialist Division.

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[ATTACHMENT O]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

New York, NY, September 8, 1997.

CLA-2-62:RR:NC:WA:353 B88341

Category: Classification

Tariff No. 3926.90.3500,

6702.90.3500, and 9615.19.6000

Ms. KIMBERLY CARTER  
CIRCLE INTERNATIONAL  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of Bridal headpieces from Hong Kong.

DEAR Ms. CARTER:

In your letter dated August 1, 1997, received in our office on August 4, 1997, you requested a classification ruling on behalf of your client Bridal Originals. Samples were submitted for review.

The submitted samples, **CR-801, TR-832, AB-813, AB-822 and HB-806** are stated to be fabric covered metal framed headpieces which after arriving into the United States will be combined with a veil to make wedding veils.

**Styles AB-822** is circular and **AB-813** is a semi-circle and are headpieces that are worn as a wreath on top of the head. They are constructed of textile components with plastic beads which have their essential character imparted by the textile components that resemble flowers.

**Styles CR-801 and TR-832** are circular headpieces worn on top of the head like a wreath and are constructed of decorative elements that are made up of plastic pearls. In style **CR-801** the plastic pearls are affixed to a textile base while in style **TR-832** the plastic pearls are not. In both styles the essential character is imparted by the plastic pearl decorations.

**Style HB-806** is a horseshoe shaped headband that is worn over the head which besides being ornamental is designed principally to hold the hair in place. The headband is of a semi-rigid construction of fabric flower decorations over a band of treated netting which has been stiffened to make it rigid.

The applicable subheading for **Styles AB-822 and AB-813** will be 6702.90.3500, Harmonized Tariff Schedule of the United States (HTS) which provides for "Artificial flowers, foliage fruits and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers". The rate of duty will be 9 percent ad valorem.

The applicable subheading for **Styles CR-801 and TR-832** will be 3926.90.3500, HTS, which provides for "Other articles of plastic and articles of other materials of headings 3901 to 3914: Other: Beads, bugles and spangles, not strung and not set; articles thereof, not elsewhere specified or included: Other." The rate of duty will be 6.6 percent ad valorem.

The applicable subheading for **style HB-806** will be 9615.19.6000, HTS, which provides for "Combs, hair-slides and the like; curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other." The rate of duty will be 11 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Martin Weiss at 212-466-5881.

PAUL K. SCHWARTZ

Chief, Textile & Apparel Branch,  
National Commodity Specialist Division.

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[ATTACHMENT F]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
New York, NY, September 9, 1997.

CLA-2-62:RR:NC:WA:353 B88338  
Category: Classification  
Tariff No. 6217.10.9530, 6702.10.2000,  
6702.90.3500, and 9615.19.6000

MS. KIMBERLY CARTER  
CIRCLE INTERNATIONAL  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: The tariff classification of Bridal Headpieces from Hong Kong.

DEAR MS. CARTER:

In your letter dated August 1, 1997, received in our office on August 4, 1997, you requested a classification ruling on behalf of your client Bridal Originals. Samples were submitted with your request for review.

The submitted samples, style HC-830, FH-847, CR-828, FH-846 and BP-821 are stated to be fabric covered hairpieces which one after arriving into the United States will be combined with a veil to make wedding veils. None of the styles have clasps of small combs with which to attach to the hair.

**Style FH-847** is a circular headpiece of wire loops which has been covered with woven textile of man-made fiber. The front of the headpiece features a design of half circles with a circle of plastic pearls at the bottom with five small clusters of plastic beads. The textile covered loops impart the essential character.

**Styles BP-821** is a semi-circular wreath and **CR-828** is a circular wreath that are worn on top of the head and are constructed of fabric covered wire frames which feature textile components that resemble flowers.

**Style HC-830** is an approximately circular wreath that is worn on top of the head and features textile components that resemble foliage that is highly decorated with miniature pearls with a center cluster of plastic beads at the center of the headpiece. The plastic pearls impart the essential character to the article.

**Style FH-846** is a sprig or cluster of textile components that resemble flowers. Although this item can accommodate a veil by means of velcro attachments, we believe that its principal use is that of a hair ornament.

The applicable subheading for **Style FH-847** will be 6217.10.9530, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other: Of man-made fibers". The duty rate will be 15.2 percent.

**Style FH-847** falls within textile category designation 659. Based upon international textile trade agreements products of Hong Kong are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest

that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

The applicable subheading for **Styles BP-821 and CR-828** will be 6702.90.3500, HTS, which provides for "Artificial flowers, foliage and fruits and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers". The rate of duty will be 9 percent ad valorem.

The applicable subheading for **Style HC-830** will be 6702.10.2000, HTS, which provides for "Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers foliage or fruit: Of plastics: Assembled by binding with flexible materials such as wire, paper, textile materials, or foil, or by gluing or by similar methods". The rate of duty will be 8.4 percent ad valorem.

The applicable subheading for **Style FH-846** will be 9615.19.6000, HTS, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other". The rate of duty will be 11 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Martin Weiss at 212-466-5881.

PAUL K. SCHWARTZ

Chief, Textile & Apparel Branch,  
National Commodity Specialist Division.

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[ATTACHMENT Q]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

New York, NY, September 2, 1999.

CLA-2-96:RR:NC:SP:233 E86508

Category: Classification

Tariff No. 9615.19.6000, 9615.11.1000,  
9615.11.3000, and 9615.90.3000

Ms. REGINA H. HWANG  
APEX TK CORPORATION  
4095 Schaefer Avenue  
Chino, CA 91710

Re: The tariff classification of hair ornaments from China.

DEAR Ms. HUANG:

In your letter dated August 10, 1999, you requested a tariff classification ruling.

The submitted samples are as follows:

1. Item No. SC-934 is a bridal hair ornament composed of a white textile bow measuring approximately 4 3/4 inches in length, attached to a metal barrette with a spring clasp.
2. Item No. B08851MBE.IV is a bridal hair ornament composed of sprigs of white artificial flowers, imitation pearls and plastic beads affixed to a plastic comb.
3. Item No. C-8760 is a bridal tiara composed of a metal wire frame, decorated with various sized imitation pearls.
4. Item No. S-2047 is a bridal plastic hair pin measuring 3 inches in length, with a textile flower set with an imitation pearl attached to the end of it.
5. Item No. S-2051 is a bridal plastic hair pin measuring 3 inches, with sprigs of imitation pearls strung on metal wire attached to the end of it.

The applicable subheading for Item No. SC-934, the barrette, and Item No. C-8760, the tiara, will be 9615.19.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for combs, hair-slides and the like: other: other. The rate of duty will be 11 percent ad valorem.

The applicable subheading for Item No. B-8851MBE.IV, the plastic comb, if valued not over \$4.50 per gross, will be 9615.11.1000, HTS, which provides for combs, hair-slides and the like: of hard rubber or plastics: combs: valued not over \$4.50 per gross. The rate of duty will be 14.4 cents/gross plus 2 percent ad valorem. If valued over \$4.50 per gross, the applicable subheading will be 9615.11.3000, HTS, which provides for combs, hair-slides and the like: of hard rubber or plastics: combs: valued over \$4.50 per gross: other. The rate of duty will be 28.8 cents/gross plus 4.6 percent ad valorem.

The applicable subheading for Items No. S-2047 and S-2051, the plastic hair pins, will be 9615.90.3000, HTS, which provides for combs, hair-slides and the like; hair pins other: hair pins. The rate of duty will be 5.1 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-637-7061.

ROBERT B. SWIERUPSKI,  
*Director,*  
*National Commodity Specialist Division.*

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[ATTACHMENT R]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
New York, NY, August 15, 1996.  
CLA-2-39:RR:NC:5:353 A86037  
Category: Classification  
Tariff No. 3926.20.9050, 6702.90.3590

MR. TERRANCE S. LISOSKI  
TERRANCE INT'L SERVICES, INC.  
Cargo Bldg. 80 Rm. 220  
JFK Int'l. Airport  
Jamaica, NY 11430

Re: The tariff classification of bridal headwear from China.

DEAR MR. LISOSKI:

In your letter dated July 22, 1996, on behalf of Terrance Int'l. Services, Inc., you requested a tariff classification ruling.

The two samples submitted are bridal headpieces. Item AK-7022ASO is a headpiece with a leaf design covered with plastic pearls and sequins. Item K-8911PK/WH is a headpiece consisting of artificial flowers in the design of rosebuds and leaves with imitation pearls. Both headpieces have a textile covered wire which enables the headpiece to fit comfortably on the head.

The samples will be returned to you as requested.

The applicable subheading for item AK-7022ASO will be 3926.20.9050, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of plastics and articles of other materials of headings 3901 to 3914: Articles of apparel and clothing accessories (including gloves): Other: Other. The rate of duty will be 5 percent ad valorem.

The applicable subheading for item K-8911PK/WH will be 6702.90.3500, Harmonized Tariff Schedule of the United States (HTS), which provides for artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers. The rate of duty will be 9 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).



A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Martin Weiss at 212-466-5881.

ROGER J. SILVESTRI,

*Director,  
National Commodity Specialist Division.*

[ATTACHMENT S]

DEPARTMENT OF THE TREASURY.

U.S. CUSTOMS SERVICE,

*Washington, DC.*

CLA-2 RR:CR:TE 963885 TF

Category: Classification

Tariff No. 9615.19.2000,

9615.19.4000, and 9615.19.6000

MS. QUNCIE AKINS,  
CIRCLE INTERNATIONAL, INC.  
4711 LeBourget Drive  
St. Louis, MO 63134

Re: Classification of bridal headpieces; Combs, hair-slides and the like; Heading 9615, HTSUSA.

DEAR MS. AKINS:

Pursuant to your classification requests, Customs has previously issued sixteen New York Ruling Letters ("NY") to your company regarding the tariff classification of various bridal hair ornaments and headpieces. These products were originally classified within the following subheadings of the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"):

3926.20.9050, which provides for: "Other articles of plastics and articles of other materials of headings 3901 to 3914: Articles of apparel and clothing accessories (including gloves, mittens and mitts): Other: Other: Other."

3926.90.3500, which provides for: "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Beads, bugles and spangles, not strung (except temporarily) and not set; articles thereof, not elsewhere specified or included: Other."

6117.80.9540, which provides for: "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other Accessories: Other \* \* \* Other."

6702.10.2000, which provides for: "Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of plastics: Assembled by binding with flexible materials such as wire, paper, textile materials, or foil or by gluing or by similar methods."

6702.90.3500, which provides for: "Artificial flowers, foliage and fruits and parts thereof: articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers."

6217.10.9530, which provides for: "Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other, Other: Of man-made fibers."

9615.11.1000, which provides for: "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: combs, hair-slides and the like: of hard rubber or plastics: combs: valued not over \$4.50 per gross."

9615.11.3000, which provides for: "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and

parts thereof: combs, hair-slides and the like: of hard rubber or plastics: combs: valued over \$4.50 per gross: other."

9615.19.6000, which provides for: "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other"

Upon review, Customs has determined that these articles were erroneously classified. The correct classification for the articles should be under the following subheadings:

9615.19.6000, HTSUSA, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other."

9615.19.2000, HTSUSA, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Combs that are valued not over \$4.50 per gross."

9615.19.4000, HTSUSA, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Combs valued over \$4.50 per gross."

Three rulings are hereby revoked and thirteen rulings are modified for the reasons set forth below.

#### *Facts:*

Forty-one samples were submitted to Customs for review in the sixteen rulings under review.

Sample 1 (style CB 632) is a textile covered headpiece. The headpiece is circular in shape and is decorated with a large textile bow, plastic pearls, sequins and lace. Two small plastic combs are attached to the sides of the headpiece for securing the item to the hair. After the headpiece is imported into the United States, a veil will be attached to it, forming a complete bridal veil. The sample was originally the subject of NY B86926, dated July 3, 1997.

Sample 2 (style AB-609) is a man-made fiber textile covered headpiece. The headpiece, which is semi-rigid and semicircular in shape, is decorated with plastic pearls and textile flowers and leaves. After the headpiece is imported into the United States, a veil will be attached to it, forming a complete bridal veil. The sample was originally the subject of NY B86924, dated July 3, 1997.

Sample 3 (style TR-615 (item 2)) is a circular-shaped headpiece. The front portion of the headpiece is decorated with plastic pearls and beads strung and shaped in arcs, giving the appearance of a crown or tiara. The back portion is decorated with textile flowers and plastic pearls and beads strung on nylon threads. A small comb is attached to the underside of the headpiece for securing the item to the hair. Sample 4 (style CR-625) is a circular-shaped headpiece. The front portion of the headpiece is decorated with rows of beaded lace, intertwined with plastic pearls and beads strung and shaped in arcs, giving the appearance of a crown or tiara. The back portion is decorated with textile flowers along with plastic pearls and beads strung on nylon threads. A small comb is attached to the underside of the headpiece for securing the item to the hair. Both samples 3 and 4 were originally subjects of NY B87108, dated July 3, 1997.

Sample 5 (style AB-707RP/IV (item 3)), is a semicircular-shaped headpiece. It is decorated with man-made fiber textile flowers and leaves, and plastic pearls strung on nylon threads. A small comb is attached to the underside of the headpiece for securing the item to the hair. Sample 6 (style VB-652 (item 4)) is a circular-shaped headpiece. It is decorated with two large textile flowers, textile leaves covered with plastic pearls, plastic pearls strung on nylon threads, and plastic pearls strung around the frame. The frame is semi-rigid in construction. Both samples 5 and 6 were originally subjects of NY B86777, dated July 8, 1997.

Sample 7 (style CR-777, item 1) is a circular-shaped headpiece. The front portion of the headpiece is decorated with plastic pearls and plastic beads sewn onto textile fabric flowers. A small comb is attached to the underside of the headpiece for securing the item to the hair. Sample 8 (style CR-702 (item 2)), is a circular-shaped headpiece. The front portion of the headpiece is covered with textile fabric which is decorated with plastic pearls strung and shaped in patterns of flowers, covering the entire surface. A small comb is attached to the underside of the headpiece for securing the item to the hair. Both samples 7 and 8 were originally subjects of NY B88340, dated August 27, 1997.

Sample 9 (style CR-770) is a circular-shaped headpiece. The front portion is decorated with white textile components and small plastic pearls. The narrower back portion of the headpiece is covered with small plastic pearls strung on nylon thread, woven with strips of textile fabric. A small comb is attached to the underside of the headpiece for securing the item to the hair. Sample 9 was originally the subject of NY B88339, dated August 27, 1997.

Sample 10 (style BA-757) is an arc-shaped headpiece. It is decorated with white textile flowers and leaves, sequins and small plastic pearls strung on nylon thread. A small comb is attached to the underside of the headpiece for securing the item to the hair. Sample 11 (style HC-631 (item 5)), is a circular-shaped headpiece. It is decorated with plastic pearls strung and shaped like flowers and white textile flowers and leaves. Two small combs are attached to the underside of the front of the headpiece for securing the item to the hair. Both samples 10 and 11 were originally subjects of NY B88327, dated August 27, 1997.

Sample 12 (style AB-766) is a semicircular-shaped headpiece. It is decorated with ivory colored textile components and plastic pearls strung and shaped in arcs. Sample 12 was originally the subject of NY B88333, dated August 27, 1997.

Sample 13 (style HW-817) is stated to be a man-made fabric covered head piece which after arriving in the United States will be combined with a veil to make a wedding veil. The item is a circular double wire frame approximately 7/8 inch wide with a diameter of approximately 6 inches with an outer surface of netting. Elastic loops are placed inside this wire frame where a small comb will be placed to affix the headpiece to the hair of the wearer. On to this outer netting surface is affixed a band of woven textile decorations of man-made fiber that resemble bows and lace circles. Sample 13 was originally the subject of NY B88330, dated September 8, 1997.

Samples 14, 15, 16 and 17 (styles AB-752, AB-762, FH-794 and CR-751) are circular headpieces worn as a wreath on top of the head. They are constructed of primarily textile components with plastic beads. These samples were originally the subjects of NY B88332, dated September 8, 1997.

Samples 18 and 19 (styles VB-816 and VB-834) are circular headpieces worn on top of the head like a wreath and are constructed of man-made woven textile components that resemble flowers. Sample 20 (style VB-807) is a circular headpiece worn on top of the head made up of beaded components that resemble flowers. Sample 21, style CA-803, is a semi-circular headpiece that is made up of three 3/8 inch narrow textile bands decorated with textile in a figure eight pattern and mounted on top of a 2 inch high frame with a textile crisscross pattern. Atop this frame is a grouping of textile component that resemble artificial flowers. These samples were originally the subjects of NY B88334, dated September 8, 1997.

Sample 22, style (CR-633) is a circular headpiece of decorative plastic beads and sequins and plastic which is shaped into flowers. Samples 23 and 24 (style WR-758 and VB-764) are circular headpieces worn on top of the head like a wreath and are constructed of man-made woven textile components that resemble flowers. Sample 25 (style SP-763) is fashioned like a sprig decorated with flower-like textile adornments and leaves made up of beads and sequins on a stiffened textile backing. A comb is attached at the rear. While a veil can be attached to this item it is principally used as a hair ornament and to hold the hair in place. Samples 22, 23, 24 and 25 were originally the subjects of NY B88335, dated September 8, 1997.

Sample 26 (style TR-820) is a circular headpiece made up of decorative plastic pearls, beads and glass rhinestones that form the crown of the article. Sample 27 (style HC-811) is a circular headpiece worn on top of the head like a wreath and is constructed of a front crown of man-made woven textile components that resemble flowers. The back part of the headpiece is covered with intertwining glass beads and plastic pearls. Sample 28 (style CR-836) is a circular headpiece made up of textile covered concentric wire loops that form the crown of the article. There are three textile ornaments that resemble small flowers at the bottom of the crown. Samples 26, 27 and 28 were originally the subjects of NY B88336, dated September 8, 1997.

Sample 29 (style TR-714) is a circular headpiece made up of decorative plastic beads in the shape of intertwined strands of pearls. Sample 30 (style BA-618) and sample 31 (style AB-701) are semi-circular headpieces worn on top of the head like a wreath and are constructed of man-made woven textile components that resemble flowers. Sample 32 (style CR-729) is a semi-circular headpiece made up of three layered overlapping woven man-made textile pointed ovals with a row of plastic pearls at the bottom and other plastic

pearls dispersed throughout the item. Sample 29, 30, 31 and 32 were originally the subjects of NY B88337, dated September 8, 1997.

Sample 33 (style AB-822) is circular and sample 34 (AB-813) is a semi-circle and both are headpieces that are worn as a wreath on top of the head. They are constructed of textile components that resemble flowers and with plastic beads. Samples 35 and 36 (styles CR-801 and TR-832 respectively) are circular headpieces worn on top of the head like a wreath and are constructed of decorative elements that are made up of plastic pearls. In style CR-801, the plastic pearls are affixed to a textile base while in style TR-832 the plastic pearls are not. Samples 33, 34, 35 and 36 were originally the subjects of NY B88341, dated September 8, 1997.

Sample 37 (style FH-847) is a circular headpiece of wire loops which has been covered with woven textile of man-made fiber. The front of the headpiece features a design of half circles with a circle of plastic pearls at the bottom with five small clusters of plastic beads. Sample 38 (style BP-821) is a semi-circular wreath and Sample 39 (CR-828) is a circular wreath. Both are worn on top of the head and are constructed of fabric covered wire frames which feature textile components that resemble flowers. Sample 40 (style FH-846) is a sprig or cluster of textile components that resemble flowers. Although this item can accommodate a veil by means of Velcro® attachments, we believe that its principal use is that of a hair ornament. Sample 41 (style HC-830) is a hair ornament consisting of textile components that resemble flowers. Samples 37, 38, 39, 40 and 41 were originally the subjects of NY B88338, dated September 9, 1997.

#### *Issue:*

What is the proper classification of the bridal headpieces under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

#### *Law and Analysis:*

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRI's"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Customs has issued at least 18 rulings classifying bridal headpieces in at least 10 different subheadings throughout the tariff. There appears to be no clear, consistent method for the classification of these articles. At the urging of the National Commodity Specialist Division, Customs recently reexamined the rulings on bridal headpieces and determined that a more reasoned and simplified approach to the classification of these articles exists as set forth below. In HQ 963482, dated December 28, 2001, Customs reexamined the classification of bridal headpieces and crafted a more reasoned and simplified approach to the classification of these articles. This ruling letter follows the analysis of HQ 963482 as set forth below.

Heading 9615, HTSUSA, provides for, among other things, combs, hair-slides and the like. The Explanatory Notes to heading 9615, HTSUSA, state that the heading covers, *inter alia*:

- (1) **Toilet combs of all kinds**, including combs for animals.
- (2) **Dress combs of all kinds**, whether for personal adornment or for keeping the hair in place.
- (3) **Hair-slides and the like** for holding the hair in place or for ornamental purposes. These articles are usually made of plastics, ivory, bone, horn, tortoise-shell, metal, etc.

\* \* \* \* \*

The instant samples are similar to dress combs and hair-slides in that they are worn primarily for personal adornment and for ornamental purposes. The EN also states that textile headbands of Section XI are excluded from heading 9615, HTSUSA. However, in Treasury Decision (T.D.) 96-24, dated February 16, 1996, Customs stated that the EN

only excludes headbands made entirely of textile materials.<sup>1</sup> The heading text to be interpreted is "combs, hair-slides and the like." Those articles similar to, or of the same class or kind as, combs and hair-slides are clearly within the scope of the heading. As noted above, the supporting EN states that dress combs and hair-slides may have the dual nature of holding the hair in place and adorning the hair. Bridal headpieces fit this dual nature and therefore are classifiable within heading 9615, HTSUSA, as similar to combs and hair-slides. See also HQ 087667, dated November 13, 1990.

Further support for the classification of bridal headpieces in heading 9615, HTSUSA, is found in the EN to heading 7113, HTSUSA. Heading 7113, HTSUSA, covers articles of jewellery of precious metal or metal clad with precious metal. The EN to heading 7113, HTSUSA, states that the heading covers, among other things, articles of jewellery wholly or partly of precious metal or metal clad with precious metal that are:

- (1) **Small objects of personal adornment** (gem-set or not) such as rings, bracelets, necklaces, brooches, ear-rings, neck chains, watch-chains and other ornamental chains; fobs, pendants, tie pins and clips, cuff-links, dress-studs, buttons, etc.; religious or other crosses; medals and insignia; hat ornaments (pins, buckles, rings, etc.); ornaments for handbags; buckles and slides for belts, shoes, etc.; **hair-slides, tiaras, dress combs and similar hair ornaments.** (second emphasis added).

Customs believes that the bridal headpieces are similar in nature to tiaras, as well as hair-slides, tiaras and dress combs. Thus, the fact that tiaras and similar hair ornaments are classified with hair-slides and dress combs when made of precious metal, supports the conclusion that bridal headpieces should be classified with hair-slides and dress combs, in heading 9615, HTSUSA, when made of materials other than precious metal.

Furthermore, Customs has consistently classified a variety of hair ornaments, such as barrettes, hair clips and hair clippees, under heading 9615, HTSUSA. See HQ 733603, dated October 15, 1991; HQ 556608, dated June 24, 1992; HQ 950700, dated August 25, 1993; HQ 950614, dated November 21, 1991; HQ 951234, dated March 11, 1992; HQ 956774, dated November 17, 1994; HQ 559737, dated June 27, 1997; HQ 959187, dated December 9, 1997; HQ 960976, dated June 24, 1998; and HQ 962134, dated October 6, 1998. Accordingly, we find that the bridal headpieces are classifiable pursuant to GRI 1 under heading 9615, HTSUSA.

Next, by application of GRI 6, we must determine classification at the subheading level. Subheadings 9615.11 and 9615.19, HTSUSA, specifically provide for combs, hair-slides and the like. Classification at this six-digit subheading level is divided into two categories:

- 1) combs, hair-slides and the like of hard rubber or plastics; and
- 2) combs, hair-slides and the like of other materials.

Since the bridal headpieces are composite goods of plastic, textile and wire components, classification is governed by GRI 3(b) which states that composite goods are classified as if they consisted of the component or material which gives them their essential character.

Thus, the first step in the analysis is to determine what material or component imparts the essential character to the bridal headpieces. In this particular case, given the highly ornamental nature of the articles, we focus on the exterior decorations rather than the bases. In HQ 963482, Customs found that the articles' textile components provided the outstanding visual impact as they covered a majority of the surface area on each of the bridal headpieces. Customs also determined that although plastic pearls and rhinestones were present, they were not in sufficient quantity to stand out as the predominant material or component. Consequently, in HQ 963482, Customs found that the bridal headpieces are classifiable under subheading 9615.19, HTSUSA, as combs, hair-slides or the like of materials other than hard rubber or plastic.

At the eight-digit level, Customs determined in HQ 963482 whether the bridal headpieces were combs or other articles. In HQ 963482, a "comb" was defined as "a thin, toothed strip for smoothing, arranging or fastening the hair." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 284 (1984). We have ten samples which have at least one comb for attaching the headpiece to the head. Customs believes that they are different types of hair ornaments. These ten bridal headpieces (which are substantially similar to the merchandise of HQ 963482) are distinguishable from dress combs in terms of shape and size. The large circular and semi-circular decorative portions of the headpieces weigh in favor of

<sup>1</sup> T.D. 96-24 also addressed the classification of headbands, ponytail holders and similar articles of mixed construction. However, Customs finds that bridal headpieces are distinguishable from the types of hair holders covered by the decision. Thus, bridal headpieces are beyond the scope of T.D. 96-24.

finding that the headpieces are hair ornaments other than dress combs. Accordingly, we find that these are bridal headpieces and are classifiable as other articles under subheading 9615.19.6000, HTSUSA.

The remaining thirty-one samples which do not contain a comb (nor are combs) are also substantially similar to the merchandise of HQ 963482. Therefore, they are also classifiable as other articles under subheading 9615.19.6000, HTSUSA.

Please find attached the above-cited ruling letter for your reference.

*Holding:*

The following rulings are hereby revoked:

NY B86926, dated July 3, 1997  
NY B86924, dated July 3, 1997  
NY B88330, dated September 8, 1997

The following rulings are hereby modified:

NY B87108, dated July 3, 1997  
NY B86777, dated July 8, 1997  
NY B88340, dated August 27, 1997  
NY B88339, dated August 27, 1997  
NY B88327, dated August 27, 1997  
NY B88333, dated August 27, 1997  
NY B88332, dated September 8, 1997  
NY B88334, dated September 8, 1997  
NY B88335, dated September 8, 1997  
NY B88336, dated September 8, 1997  
NY B88337, dated September 8, 1997  
NY B88341, dated September 8, 1997  
NY B88338, dated September 9, 1997

All of the forty-one samples are classifiable in subheading 9615.19.6000, HTSUSA, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other." The general column one duty rate is eleven percent *ad valorem*.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification), you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. §1625 (c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

JOHN DURANT,  
Director,  
Commercial Rulings Division.



## [ATTACHMENT T]

DEPARTMENT OF THE TREASURY,

U.S. CUSTOMS SERVICE,

Washington, DC.

CLA-2 RR:CR:TE 963889 TF

Category: Classification

Tariff No. 9615.19.6000

MR. TERRANCE S. LISOSKI,  
TERRANCE INTERNATIONAL SERVICES  
Cargo Bldg. 80 Rm. 220  
JFK International Airport  
Jamaica, NY 11430

Re: Classification of bridal headpieces; Combs, hair-slides and the like; Heading 9615, HTSUSA.

DEAR MR. LISOSKI:

Pursuant to your classification request, Customs has previously issued NY A86037, dated April 15, 1996 to you regarding the tariff classification of bridal headpieces. These products were originally classified in subheadings 3926.20.9050, HTSUSA, which provides for "other articles of plastics and articles of other materials of headings 3901 to 3914: Articles of apparel and clothing accessories (including gloves): Other: Other" and subheading 6702.90.3590, HTSUSA, which provides for "artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers."

Upon review, Customs has determined that this merchandise was erroneously classified. The correct classification should be within subheading 9615.19.6000, HTSUSA, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other."

NY A86037 is hereby revoked for the reasons set forth below.

**Facts:**

Style AK-7022ASO is a headpiece with a textile leaf design covered with plastic pearls and sequins. Style K-8911PK/WH is a headpiece consisting of textile flowers in the design of rosebuds and leaves with imitation pearls. Both headpieces have a textile covered wire which enables the headpiece to fit comfortably on the head. Both samples were originally the subject of NY A86037, dated August 15, 1996.

**Issue:**

What is the proper classification of the bridal headpieces (styles AK-7022ASO and K-8911PK/WH) under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

**Law and Analysis:**

The classification of substantially similar merchandise is addressed in HQ 963482, dated December 28, 2001 and HQ 963885. In HQ 963482, it was determined that bridal headpieces were properly classifiable in subheading 9615.19, HTSUSA, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like."

As the subject merchandise is substantially similar to the merchandise addressed in the aforementioned rulings, styles AK-7022ASO and K-8911PK/WH should be classified accordingly in subheading 9615.19.6000, HTSUSA, dutiable at 11 percent *ad valorem*. A copy of HQ 963482 is attached for your reference.

**Holding:**

The bridal headpieces (styles AK-7022ASO and K-8911PK/WH) are classifiable under subheading 9615.19.6000, HTSUSA, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Other." The general column one duty rate is eleven percent *ad valorem*.



The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at [www.customs.gov](http://www.customs.gov).

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,  
Director,  
Commercial Rulings Division.

[ATTACHMENT U]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
Washington, DC.

CLA-2 RR:CR:TE 963902 TF  
Category: Classification  
Tariff No. 9615.19.2000 and 9615.19.4000

MS. REGINA H. HWANG,  
APEX TK CORPORATION  
4095 Schaefer Avenue  
Chino, CA 91710

Re: Classification of bridal headpieces; Combs, hair-slides and the like; Heading 9615, HTSUSA.

DEAR MS. HWANG:

Pursuant to your classification request, Customs has previously issued NY E86508, dated September 2, 1999 to you on behalf of an unidentified client regarding the tariff classification of bridal hair ornaments. These products were originally classified within subheading 9615.11.1000, HTSUSA, which provides for: "combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: combs, hair-slides and the like: of hard rubber or plastics: combs: valued not over \$4.50 per gross."

Upon review, Customs has determined that one item of this merchandise was erroneously classified. The correct classification should be within one of the following subheadings:

9615.19.2000, HTSUSA, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Combs that are valued not over \$4.50 per gross."

9615.19.4000, HTSUSA, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Combs valued over \$4.50 per gross."

NY E86508 is hereby modified for the reasons set forth below.

*Facts:*

Style B-8851MBE-IV is a bridal hair ornament composed of sprigs of white artificial flowers, imitation pearls, and plastic beads affixed to a plastic comb. The merchandise was originally the subject of NY E86508, dated September 2, 1999.

*Issue:*

What is the proper classification of the bridal headpiece (B-8851MBE-IV) under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

*Law and Analysis:*

The classification of substantially similar merchandise is addressed in HQ 963482, dated December 28, 2001 and HQ 963885. In HQ 963482, it was determined that bridal headpieces were properly classifiable in subheading 9615.19, HTSUSA, which provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like."

However, unlike the articles in HQ 963482, which were circular headpieces, the instant merchandise is a decorative hair ornament with a comb. Hair combs are provided in subheading 9615.19.2000 and 9615.19.4000, HTSUSA. Combs that are valued less than \$4.50 per gross are classified in subheading 9615.19.2000, HTSUSA, dutiable at 9.7 cent/gross + 1.3%. Combs valued greater than \$4.50 per gross are classified in subheading 9615.19.4000, HTSUSA, dutiable at 28.8 cent/gross + 4.6%.

Attached you will find the above-cited HQ 963482 for your reference. As the subject merchandise is substantially similar to the merchandise addressed in the aforementioned rulings, the subject merchandise should be classified accordingly in subheading 9615.19, HTSUSA.

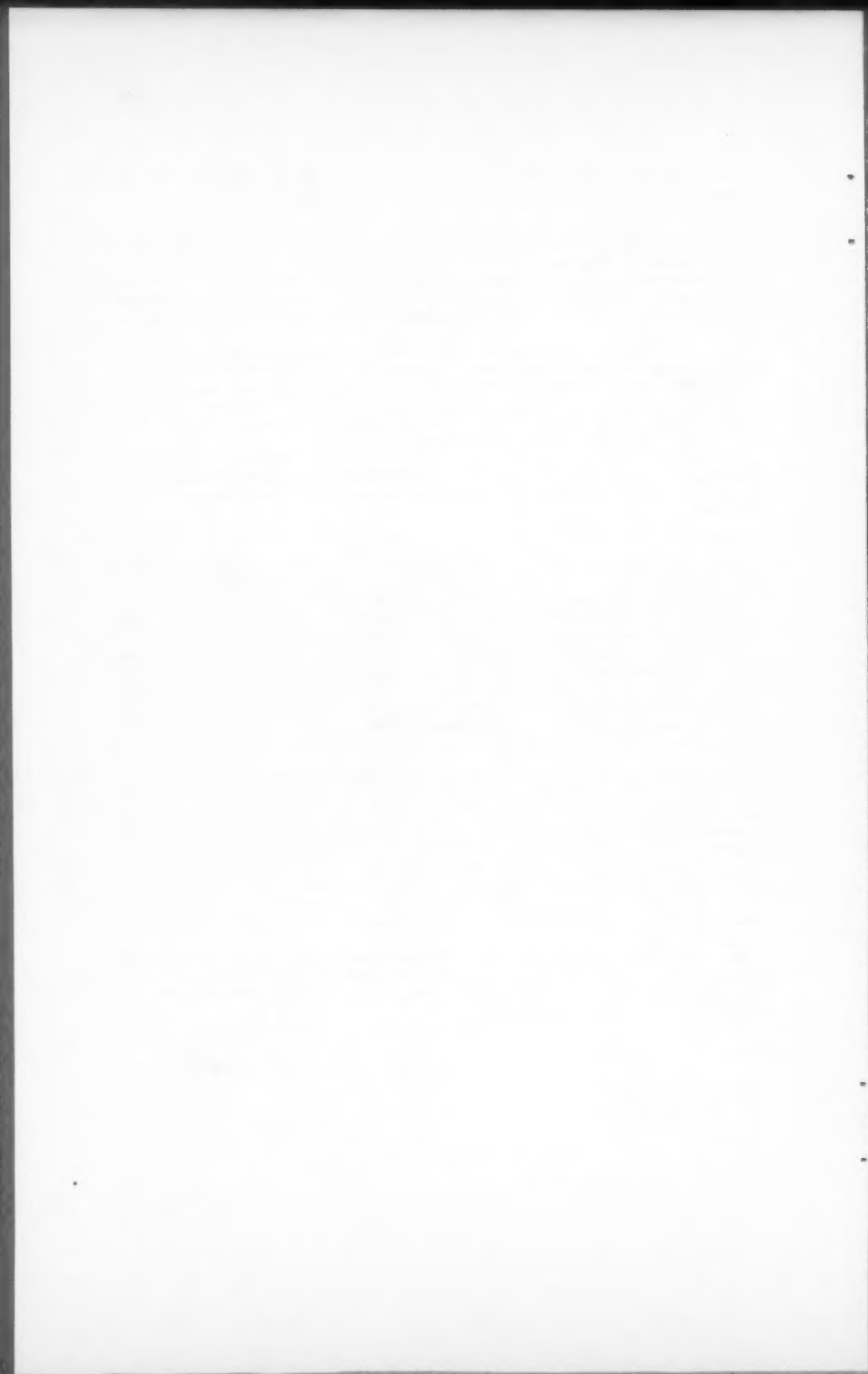
*Holding:*

The bridal headpiece (style B-8851MBE-IV) is classifiable under subheading 9615.19.2000 or 9615.19.4000, HTSUSA. As we do not have information related to the value of the comb, we are providing you with both subheadings which may be applicable for classification of the hair comb. Subheading 9615.19.2000, HTSUSA, provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Combs: Valued not over \$4.50 per gross." The general column one duty rate is 9.7 cent/gross + 1.3% *ad valorem*. Subheading 9615.19.4000, HTSUSA, provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Combs, hair-slides and the like: Other: Combs: Valued over \$4.50 per gross." The general column one duty rate is at 28.8 cent/gross + 4.6% *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at [www.customs.gov](http://www.customs.gov).

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,  
Director,  
Commercial Rulings Division.



# U.S. Customs Service

## *Proposed Rulemakings*

19 CFR Part 133

RIN 1515-AC98

### CIVIL FINES FOR IMPORTATION OF MERCHANDISE BEARING A COUNTERFEIT MARK

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations pertaining to the importation of merchandise bearing a counterfeit mark to clarify the limit on the amount of a civil fine which may be assessed by Customs when merchandise bearing a counterfeit mark is imported. The regulations currently use, as a measurement for determining the limit, the domestic value of merchandise as if it had been genuine, based on the manufacturer's suggested retail price of the merchandise at the time of seizure. The language set forth in the proposed rule adheres more closely to the statutory language, basing the limit of the civil fine on the value of the genuine goods according to the manufacturer's suggested retail price (MSRP), without any reference to domestic value. Because the MSRP excludes retail sales and markdowns, it is usually greater than the good's domestic value. Removing the distinction between the statutory and regulatory language will clear up confusion and result in Customs more uniformly determining the amount of a civil fine when merchandise bearing a counterfeit mark is imported.

DATES: Comments must be received on or before August 6, 2002.

ADDRESSES: Written comments, regarding both the substantive aspects of the proposed rule and how it may be made easier to understand, may be submitted to and inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Lynne O. Robinson, Office of Regulations and Rulings: (202) 927-2346.

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

The Anticounterfeiting Consumer Protection Act of 1996 (the ACPA; Pub. L. 104-153, 110 Stat. 1386) was signed into law on July 2, 1996, to

ensure that Federal law adequately addresses the scope and sophistication of modern counterfeiting which costs American businesses an estimated \$200 billion a year worldwide. Toward that end, the ACPA amended section 526 of the Tariff Act of 1930, as amended (19 U.S.C. 1526), to provide two new tools to fight the importation of counterfeit goods: (1) the seizure, forfeiture, and destruction of merchandise bearing a counterfeit mark under 19 U.S.C. 1526(e) (section 1526(e)), as amended by section 9 of the ACPA, and (2) the imposition of a civil fine under 19 U.S.C. 1526(f) (section 1526(f)), a new section of law created under section 10 of the ACPA.

Under section 1526(e), merchandise bearing a counterfeit mark that is seized and forfeited must be destroyed except where the merchandise is not unsafe or a hazard to health and the trademark owner has consented to its disposal by one of several alternative methods (see sections 1526(e)(1), (2) and (3)). This provision ensures that a violator cannot regain possession of the forfeited goods and distribute them in some other manner (including making another attempt to import them at another U.S. port or into another country). Under section 1526(f)(1), a civil fine is assessed against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under section 1526(e). Section 1526(f)(2) provides for a fine for the first seizure in an amount up to the value the imported merchandise would have had if it were genuine, according to the manufacturer's suggested retail price (MSRP). Section 1526(f)(3) provides for a fine for subsequent seizures in the amount of up to twice the value the imported merchandise would have had if it were genuine, according to the MSRP.

On November 17, 1997, Customs published interim regulations in the Federal Register (62 FR 61231) to amend § 133.25 of the Customs Regulations (19 CFR 133.25) to reflect the ACPA's amendment of 19 U.S.C. 1526. The interim amendments were adopted as a final rule published in the Federal Register (63 FR 51296) on September 25, 1998. A final rule document published in the Federal Register (64 FR 9058) on February 24, 1999, redesignated § 133.25 as § 133.27.

Under § 133.27 of the Customs Regulations (19 CFR 133.27), Customs may impose a civil fine, in addition to any other penalty or remedy authorized by law, against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise bearing a counterfeit mark that is seized under § 133.21 (and 19 U.S.C. 1526(e)). Under § 133.27(a), the fine imposed for the first violation (seizure) will not be more than the domestic value of the merchandise (as set forth in § 162.43(a)) as if it had been genuine, based on the MSRP of the genuine merchandise at the time of seizure. Under § 133.27(b), the fine imposed for subsequent violations will not be more than twice the domestic value of the merchandise as if it had been genuine, based on the MSRP of the genuine merchandise at the time of seizure.

Upon review of § 133.27, Customs has determined that the language of the regulation is inconsistent with the language of section 1526(f). The regulation employs the term "domestic value" (of the merchandise) while the statute does not use that term. Moreover, because the MSRP is exclusive of any sale or markdown of a good at retail, it is usually greater than the good's domestic value. Therefore, setting the maximum amount of a civil fine by means of a formula that includes both the domestic value of the merchandise and the value of genuine merchandise according to the MSRP is confusing and contributes to misunderstanding by both Customs personnel and the public.

A review of the regulatory history indicates that Customs, in using the term "domestic value" in § 133.27 (§ 133.25 when published as a final rule on September 25, 1998), relied on 19 U.S.C. 1606 (section 1606) and § 162.43(a) of the Customs Regulations (19 CFR 162.43(a)). Section 1606 provides that Customs will determine the domestic value of merchandise seized under the Customs laws at the time and place of appraisal. Section 162.43(a) provides that "domestic value" as used in section 1606 means the price for which seized or similar property is freely offered for sale at the time and place of appraisal and in the ordinary course of trade.

While this "domestic value appraisal rule" of section 1606 and § 162.43(a) is applicable in various circumstances involving merchandise seized under the Customs laws, its application is qualified. Under 19 U.S.C. 1600, the procedures set forth in 19 U.S.C. 1602 through 1619, including the use of domestic value as laid out in section 1606, apply to seizures of property under any law enforced or administered by Customs unless such law specifies different procedures. Section 1526(f), however, specifies a different procedure for imposing civil fines for the importation of merchandise bearing a counterfeit mark. Therefore, the formula for civil fines set forth in section 1526(f) is controlling, and the domestic value appraisal rule of section 1606 and § 162.43(a) does not apply for that purpose.

Based on the foregoing, Customs believes that the term "domestic value" should be removed from § 133.27, leaving "manufacturer's suggested retail price" as the applicable measure of the penalty. The result would be that the formula for setting the maximum civil fine under the regulation would more closely follow the language of the statute. This would clarify for Customs personnel and the importing public the limit of a civil fine and would enhance uniformity in Customs assessment of fines when merchandise bearing a counterfeit mark is imported and seized. In addition, as the MSRP of a given article (in this case the genuine article that corresponds to imported merchandise bearing a counterfeit mark) is normally greater than its domestic value, because MSRP excludes retail sales and markdowns, civil fines based on the MSRP will normally be greater. Thus, uniform application of the regulation will ensure that the Congressional intent in enacting section 1526(f), i.e., to enhance deterrence of trade in counterfeit goods, is uniformly served.

Customs notes that guidelines for the mitigation of penalties assessed under section 1526(f) and § 133.27 were published in T.D. 99-76 (33 Cust. Bull. No. 43, October 27, 1999). However, as the guidelines also use the term "domestic value" in the same manner as § 133.27, if the proposed rule is adopted as final, Customs will modify the guidelines to more closely adhere to the language of section 1526(f).

#### EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

#### REGULATORY FLEXIBILITY ACT

The proposed amendment, if adopted as final, will result in the language of the regulation more closely adhering to the language of the statute, thus clarifying the maximum amount Customs can assess for a civil fine when merchandise bearing a counterfeit mark is imported and seized. Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), it is certified that the proposed amendment, if adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, the proposed amendment is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

#### DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices contributed in its development.

#### LIST OF SUBJECTS IN 19 CFR PART 133

Counterfeit goods, Penalties, Seizures and forfeitures, Trademarks.

#### PROPOSED AMENDMENT TO THE REGULATIONS

For the reasons stated in the preamble, it is proposed to amend Part 133 of the Customs Regulations (19 CFR Part 133) as follows:

#### PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. The authority citation for part 133 continues to read, in part, as follows:

**Authority:** 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

\* \* \* \* \*

2. Section 133.27 is revised to read as follows:

#### **§ 133.27 Civil fines for those involved in the importation of merchandise bearing a counterfeit mark.**

In addition to any other penalty or remedy authorized by law, Customs may impose a civil fine under 19 U.S.C. 1526(f) on any person who directs, assists financially or otherwise, or aids and abets the importa-



tion of merchandise for sale or public distribution that bears a counterfeit mark resulting in a seizure of the merchandise under 19 U.S.C. 1526(e) (see § 133.21 of this subpart), as follows:

(a) *First violation.* For the first seizure of merchandise under this section, the fine imposed will not be more than the value the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price at the time of seizure.

(b) *Subsequent violations:* For the second and each subsequent seizure under this section, the fine imposed will not be more than twice the value the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price at the time of seizure.

ROBERT C. BONNER,

*Commissioner of Customs.*

Approved: June 3, 2002.

TIMOTHY E. SKUD,

*Deputy Assistant Secretary of the Treasury.*

[Published in the Federal Register, June 7, 2002 (67 FR 39321)]

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## 19 CFR Parts 141 and 151

RIN 1515-AD05

### CONDITIONAL RELEASE PERIOD AND CUSTOMS BOND OBLIGATIONS FOR FOOD, DRUGS, DEVICES, AND COSMETICS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** This document proposes to amend the Customs Regulations to clarify the responsibilities of importers of food, drugs, devices, and cosmetics under Customs entry bond and to provide a reasonable period of time to allow the Food and Drug Administration to perform its enforcement functions with respect to these articles. The proposed amendments provide for a specific conditional release period for any food, drug, device, or cosmetic which has been released under bond and for which admissibility is to be determined under the provisions of the Food, Drug and Cosmetic Act. The proposed amendment also clarifies the amount of liquidated damages that may be assessed when there is a breach of the terms and conditions of the Customs bond. The document also proposes to amend the Customs Regulations to authorize any representative of the Food and Drug Administration (FDA) to obtain a sample of any food, drug, device, or cosmetic, the importation of which is governed by section 801 of the Food, Drug and Cosmetic Act, as amended (21 U.S.C. 381).

**DATES:** Comments must be received on or before August 6, 2002.

**ADDRESSES:** Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:** Jeremy Baskin, Office of Regulations and Rulings, Penalties Branch (202-927-2344).

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

Section 801 of the Food, Drug and Cosmetic Act, as amended (21 U.S.C. 381), and the regulations promulgated under that statute, provide the basic legal framework governing the importation of foodstuffs into the United States. Under 21 U.S.C. 381(a), the Secretary of the Treasury will deliver to the Secretary of Health and Human Services, upon request, samples of food, drugs, devices, and cosmetics which are being imported or offered for import. The Secretary of Health and Human Services is authorized under section 381(a) to refuse admission of, among other things, any article that appears from the examination or otherwise to be adulterated or misbranded or to have been manufactured, processed, or packed under insanitary conditions. In addition, the Secretary of the Treasury is required by section 381(a) to cause the destruction of any article refused admission unless the article is exported, under regulations prescribed by the Secretary of the Treasury, within 90 days of the date of notice of the refusal or within such additional time as may be permitted pursuant to those regulations.

Under 21 U.S.C. 381(b), pending decision as to the admission of an article being imported or offered for import, the Secretary of the Treasury may authorize delivery of that article to the owner or consignee upon the execution by him of a good and sufficient bond providing for the payment of liquidated damages in the event of default, as may be required pursuant to regulations of the Secretary of the Treasury. In addition, section 381(b) allows the owner or consignee in certain circumstances to take action to bring an imported article into compliance for admission purposes under such bonding requirements as the Secretary of the Treasury may prescribe by regulation.

Based upon the above statutory provisions, imported foods, drugs, devices, and cosmetics are conditionally released under bond while determinations as to admissibility are made; see § 12.3 of the Customs Regulations (19 CFR 12.3). Under current § 141.113(c) of the Customs Regulations (19 CFR 141.113(c)), Customs may demand the return to Customs custody of most types of merchandise that fail to comply with the laws or regulations governing their admission into the United States (also referred to as the redelivery procedure).

The condition of the basic importation and entry bond contained in § 113.62(d) of the Customs Regulations (19 CFR 113.62(d)) sets forth the obligation of the importer of record to timely redeliver released merchandise to Customs on demand and provides that a demand for redelivery will be made no later than 30 days after the date of release of the merchandise or 30 days after the end of the conditional release period, whichever is later. Under current procedures, when imported merchandise is refused admission by the FDA, Customs issues a notice of redelivery in order to establish liquidated damages if the importer of record fails to export, destroy, or redeliver the refused merchandise in the time period prescribed in that notice of redelivery.

Customs has taken the position in C.S.D. 86-21 that the term "end of the conditional release period" in 19 CFR 113.62(d) has reference to a set time limitation that is either established by regulation (*see*, for example, 19 CFR 141.113(b) which prescribes a 180-day conditional release period for purposes of determining the correct country of origin of imported textiles and textile products) or is established by express notification to the importer of record. The end of the conditional release period does not refer to the liquidation of the entry covering the imported merchandise.

In light of the above authorities, Customs now proposes to amend the regulations to provide for a specific conditional release period for merchandise for which the FDA is authorized to determine admissibility. The proposed changes will clarify importers' responsibilities under the bond, provide a reasonable period of time to allow the FDA to perform its enforcement functions, and provide finality to the process.

#### *Proposed regulatory changes*

This document proposes to make the following specific changes to the Customs Regulations to address these points:

1. It is proposed to redesignate some paragraphs in § 141.113 due to the addition of a new paragraph (c), which will provide for a specific conditional release period of 180 days for any food, drug, device, or cosmetic. The FDA will have this time period to make its determination of admissibility. Similar to the case of textiles and textile products mentioned above, the proposed amendment specifies a 180-day conditional release period but also provides for a shorter period if FDA makes a determination of inadmissibility before the expiration of that 180-day period. It is noted that as a consequence of this new text, under 19 CFR 113.62(d), a demand for redelivery could be made up to 210 days (that is, 180 days plus 30 days) after the date of release of the merchandise. The proposed regulation will also make clear that the failure to redeliver merchandise will result in the assessment of liquidated damages equal to three times the value of the merchandise or equal to the domestic value of merchandise in those instances where the port director has required a bond equal to the domestic value as permitted by current § 12.3.

2. It is proposed to amend § 151.10 of the Customs Regulations (19 CFR 151.10) to authorize a representative of the FDA to obtain samples

of food, drugs, devices, and cosmetic products covered by the Food, Drug and Cosmetic Act.

#### COMMENTS

Before adopting these proposed regulatory amendments as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

#### REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the proposed amendments, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed regulatory amendments reflect current statutory requirements, and they will not require any additional action on the part of the public but rather are intended to facilitate Customs enforcement efforts involving existing import requirements. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. Furthermore, this document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

#### LIST OF SUBJECTS

##### *19 CFR Part 141*

Bonds, Customs duties and inspection, Entry procedures, Imports, Prohibited merchandise, Release of merchandise.

##### *19 CFR Part 151*

Customs duties and inspection, Examination, Sampling and testing, Imports, Laboratories, Penalties, Reporting and recordkeeping requirements.

#### PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated above, it is proposed to amend Parts 141 and 151 of the Customs Regulations (19 CFR Part 141 and 151) as set forth below.

## PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 continues to read in part as follows:

**Authority:** 19 U.S.C. 66, 1448, 1484, 1624.

\* \* \* \* \*

Section 141.113 also issued under 19 U.S.C. 1499, 1623.

2. Section 141.113, is amended as follows:

a. redesignate current paragraphs (c) through (h) as paragraphs (d) through (i);

b. add a new paragraph (c);

c. amend redesignated paragraph (d) by removing the words "(a) or (b)" and adding the words "(a), (b), or (c)" after the words "for any reason not enumerated in paragraph". New paragraph (c) reads as follows:

**§ 141.113 Recall of merchandise released from Customs custody.**

\* \* \* \* \*

(c) *Food, drugs, and cosmetics.* For purposes of determining the admissibility of any food, drug, device, and cosmetic imported pursuant to section 801 of the Food, Drug and Cosmetic Act (21 U.S.C. 381), as amended, the release from Customs custody of any such product will be deemed conditional during the 180-day period following the date of release. If before the end of the 180-day period the Food and Drug Administration (FDA) finds that a food, drug, device, or cosmetic is not entitled to admission into the commerce of the United States, it will communicate that fact to the port director who will demand the redelivery of the product to Customs custody. Customs will issue a notice of redelivery within 30 days from the date the product was refused admission by the FDA. The demand for redelivery may be made contemporaneously with the notice of refusal issued by the FDA. A failure to comply with a demand for return to Customs custody made under this paragraph will result in the assessment of liquidated damages equal to three times the value of the merchandise involved unless the port director has prescribed a bond equal to the domestic value of the merchandise pursuant to section 12.3(b) of this Chapter.

\* \* \* \* \*

**PART 151—EXAMINATION, SAMPLING, AND  
TESTING OF MERCHANDISE**

1. The general authority citation for Part 151 is revised, and a specific authority citation for § 151.10 is added, to read as follows:

**Authority:** 19 U.S.C. 66, 1202 (General Notes 23 and 24, Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

Section 151.10 also issued under 21 U.S.C. 381;

\* \* \* \* \*

2. In § 151.10, add a sentence at the end of the text to read as follows:

**§ 151.10 Sampling.**

\*\*\* For purposes of determining admissibility, representatives of the Food and Drug Administration may obtain samples of any food, drug, device, or cosmetic, the importation of which is governed by section 801 of the Food, Drug and Cosmetic Act, as amended (21 U.S.C. 381).

ROBERT C. BONNER,  
*Commissioner of Customs.*

Approved: June 3, 2002.

TIMOTHY E. SKUD,

*Deputy Assistant Secretary of the Treasury.*

[Published in the Federal Register, June 7, 2002 (67 FR 39322)]

# U.S. Court of Appeals for the Federal Circuit

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ROCKNEL FASTENER, INC., PLAINTIFF-APPELLANT *v.*  
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01-1006

(Decided October 4, 2001)

*Steven P. Sonnenberg*, Sonnenberg & Anderson, of Chicago, Illinois, argued for plaintiff-appellant. Of counsel was *Michael J. Cunningham*.

*Amy M. Rubin*, Attorney, Civil Division, Commercial Litigation Branch, International Trade Field Office, of New York, New York, argued for defendant-appellee. With her on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC; and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Sheryl A. French*, Attorney, Office of Assistant Chief Counsel, United States Customs Service, of New York, New York.

Appealed from: United States Court of International Trade  
Judge RICHARD W. GOLDBERG

Before SCHALL, BRYSON, and DYK, *Circuit Judges*.

BRYSON, *Circuit Judge*.

Rocknel Fastener, Inc., appeals from the decision of the Court of International Trade upholding the tariff schedule classification by the United States Customs Service of certain fasteners imported by Rocknel. *Rocknel Fastener, Inc. v. United States*, 118 F. Supp. 2d 1238 (Ct. Int'l Trade 2000). We affirm.

## I

The products at issue in this case consist of a variety of metal fasteners that Rocknel imported from Japan in 1997. The fasteners, which are fabricated from metal alloys, have rod-shaped bodies and hexagonally shaped heads. Their bodies are fully or partially threaded. Rocknel has admitted that the fasteners were designed to be installed in holes of assembled parts and that the fasteners were designed to be tightened or released by turning their heads.

The Customs Service liquidated the fasteners under subheading 7318.15.80 of the Harmonized Tariff Schedule of the United States



("HTSUS"). Subsequently, Rocknel filed a protest, claiming that the fasteners should have been classified under HTSUS subheading 7318.15.20.

Heading 7318 of the HTSUS covers "screws, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers \* \* \* and similar articles of iron and steel." Six-digit subheading 7318.15 narrows that category to threaded articles consisting of "other screws and bolts." That six-digit subheading is further divided into several eight-digit subheadings, including the two at issue in this case. Subheading 7318.15.20, which Rocknel argues should have been applied to the fasteners in this case, covers "bolts." Subheading 7318.15.80, which Customs applied, covers "other" items having threads with a diameter of six millimeters or more.

After Customs denied the protest, Rocknel appealed to the Court of International Trade. The court concluded that the tariff schedule required that the terms "bolt" and "screw" be given mutually exclusive definitions. The court further concluded that the definition of the terms "bolt" and "screw" found in Specification B18.2.1, Specifications for Identification of Bolts and Screws, published by the American National Standards Institute (ANSI) and the American Society of Mechanical Engineers (ASME) ("the ANSI Specification") accurately reflected both the common and the commercial meaning of those terms. Because Customs had looked to the ANSI Specification as the source of the definitions of "bolt" and "screw" for tariff classification purposes, and because Rocknel had admitted that under the ANSI Specification the fasteners at issue in this case would be classified as screws and not bolts, the court granted summary judgment to Customs upholding the agency's classification of the fasteners. This appeal followed.

## II

### A

The meaning of a tariff term, a matter of statutory construction, presents a question of law. *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1366 (Fed. Cir. 1998). When, as in this case, a tariff term is not defined in either the HTSUS or its legislative history, "the term's correct meaning is its common meaning." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1087 (Fed. Cir. 1994). The common meaning of a term used in commerce is presumed to be the same as its commercial meaning. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To ascertain the common meaning of a term, a court may consult "dictionaries, scientific authorities, and other reliable information sources" and "lexicographic and other materials." *C.J. Tower & Sons v. United States*, 673 F.2d 1268, 1271 (CCPA 1982); *Simod*, 872 F.2d at 1576.

The government agrees with the Court of International Trade that the ANSI Specification represents the common meaning of the terms "bolt" and "screw." Rocknel disputes that the ANSI Specification embodies the common meaning of the terms and asserts that Customs has not satisfied its burden of showing why a non-common meaning should

be adopted. See *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984) ("One who argues that a term in the tariff laws should not be given its common or dictionary meaning must prove that there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade.").

## B

At the outset, we must consider whether, and to what extent, Customs' classification decision in this case is entitled to deference. The Court of International Trade, relying on this court's decision in *Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999), concluded that no deference was due Customs' classification. Although the Court of International Trade correctly applied our decision in *Mead*, that decision has been superseded by the Supreme Court's subsequent decision in the *Mead* case. *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001). The Supreme Court held that when Customs has not promulgated a regulation, but has simply issued a classification ruling implicitly interpreting an HTSUS provision, the ruling is not entitled to so-called *Chevron* deference, see *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Nonetheless, the Court held that a classification ruling is entitled to some deference in accordance with the principles of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Mead*, 121 S. Ct. at 2168; see also *Gen. Elec. Co.—Med. Sys. Group v. United States*, 2001 U.S. App. LEXIS 15971 (Fed. Cir. July 17, 2001); *Hearland By-Products, Inc. v. United States*, 2001 U.S. App. LEXIS 19346 (Fed. Cir. Aug. 30, 2001). As the Court explained in *Skidmore*,

The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

323 U.S. at 140. Likewise, *Mead* indicates that when considering the degree of deference to accord a Customs classification ruling, a court should consider "its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." 121 S. Ct. at 2176.

Customs has not issued a regulation regarding construction of the terms "bolt" and "screw" in the tariff schedule. However, Customs' policy of applying the ANSI Specification has been established in Headquarters Ruling Letters dating back more than 16 years, see Headquarters Ruling Letter 951362 (June 24, 1992); Headquarters Ruling Letter 074950 (Feb. 15, 1985), and in a Customs Service publication, *Distinguishing Bolts from Screws* (April 1995). The rulings and the publication contain detailed guidance as to the distinction between bolts and screws, consistent with the ANSI Specification. Because the classification in this case is supported by thorough analysis in Customs' publications and decisions, and is consistent with prior interpretations of the pertinent provisions of the HTSUS by Customs over a period of years,

the Supreme Court's decision in *Mead* indicates that Customs' decision to interpret the provisions of HTSUS subheadings 7318.15.20 and 7318.15.80 according to the definitions contained in the ANSI Specification must be accorded some deference by the courts. As the Supreme Court recognized, the regulatory scheme at issue in this case is highly detailed, and Customs "can bring the benefit of specialized experience to bear on the subtle questions in this case." *Mead*, 121 S. Ct. at 2175. For that reason, while we recognize our independent responsibility to decide the legal issue of the proper tariff classification in this case, we also recognize our responsibility to give some deference to Customs' interpretation as we do so.

### C

Rocknel argues that the Court of International Trade erred when it assigned the terms "bolt" and "screw" mutually exclusive definitions. Rocknel asserts that because subheading 7318.15.20 is an *eo nomine* classification for "bolts," while subheading 7318.15.80 is a "basket" category for "other" products, the correct classification requires only that a particular fastener satisfy the definition of a "bolt," regardless of whether it might also be regarded as being a screw.

We agree with the Court of International Trade that whether or not heading 7318.15.80 is considered to be a "basket" category, the structure of the tariff schedule requires that the terms "bolt" and "screw" be given mutually exclusive definitions. Simply put, because subheading 7318.15 covers bolts and screws, and subheading 7318.15.20 covers bolts, subheading 7318.15.80 is necessarily limited to screws. Therefore, the proper classification of a particular fastener requires a determination whether the fastener is a bolt or a screw and does not allow for the possibility that the fastener might qualify as either.

### D

The ANSI Specification that Customs adopted as the basis for its distinction between bolts and screws is included in *Fastener Standards* (6th ed. 1988), which is published by the Industrial Fasteners Institute. The ANSI Specification begins with two general definitions:

**Bolt:** A bolt is an externally threaded fastener designed for insertion through holes in assembled parts, and is normally intended to be tightened or released by torquing a nut.

**Screw:** A screw is an externally threaded fastener capable of being inserted into holes in assembled parts, of mating with a preformed internal thread or forming its own thread, and of being tightened or released by torquing the head.

The specification then presents four primary criteria, two of which define products that are always bolts and two of which define products that are always screws. The primary criteria dictate that an externally threaded fastener is a bolt if it can be tightened or released only by torquing a nut or if it must be assembled with a nut to perform its intended service. The fastener is a screw, according to the primary criteria,

if its thread form prevents it from being assembled with a nut having a straight thread of multiple pitch length, or if it must be torqued by its head into a tapped or other preformed hole to perform its intended service. The parties agree that the imported products at issue in this case are not governed by any of the four primary criteria.

The specification continues by providing nine supplemental criteria to be used in defining fasteners that cannot be identified based on the primary criteria. The specification explains that if a fastener satisfies a majority of the supplemental criteria, it is classified as a screw. The nine criteria are, in summary: (1) the fastener has a controlled fillet at the junction of the head and the body; (2) the under head bearing surface of the fastener is smooth and flat; (3) the angularity of the under head bearing surface of the fastener is controlled; (4) the body of the fastener is closely controlled in accuracy of size and roundness; (5) the shank of the fastener is particularly straight; (6) the threads of the fastener are concentric with the body axis; (7) the length of the thread on the fastener is sufficient to develop the full strength of the fastener; (8) the fastener has a chamfered or other specially prepared point at its end; and (9) the length of the fastener is closely toleranced. The parties agree that the imported fasteners satisfy a majority of those nine criteria.

Customs argues that the definitions of bolt and screw embodied in the ANSI Specification should be used for tariff purposes because those definitions conform to the common meaning of the terms. To test that proposition, we look to several technical and general dictionary definitions:

The bolt is described as an externally threaded fastener designed for insertion through holes in assembled parts. It is normally tightened and released by turning a mated nut. A screw differs from a bolt in that it is supposed to mate with an internal thread into which it is tightened or released by turning its head. These definitions obviously do not always apply, since bolts can be screwed into threaded holes and screws can be used with nuts.

*Millwrights and Mechanics Guide* 371 (4th ed. 1986), quoted in *Rocknel*, 118 F. Supp. 2d at 1243.

A bolt is an externally threaded fastener designed for insertion through holes in assembled parts, and is normally intended to be tightened or released by torquing a nut.

A screw is an externally threaded fastener capable of being inserted into holes in assembled parts, or mating with a preformed internal thread or forming its own thread and of being tightened or released by torquing the head.

Erik Oberg et al., *Machinery's Handbook* 1417 (25th ed. 1996).

Bolt: "A threaded metal rod or pin for joining parts, having a head and usually used with a nut."

Screw: "A mechanical device for fastening things together, consisting essentially of a cylindrical or conical piece of metal threaded evenly around its outside surface with an advancing spiral ridge

and commonly having a slotted head: it penetrates only by being turned, as with a screwdriver."

*Webster's New World Dictionary* 157, 1206 (3d ed. 1988), quoted in *Rocknel*, 118 F. Supp. 2d at 1241-42.

Bolt: "A fastener consisting of a threaded pin or rod with a head at one end, designed to be inserted through holes in assembled parts and secured by a mated nut that is tightened by applying torque."

Screw: "A cylindrical rod incised with one or more helical or advancing spiral threads. \* \* \* A metal pin with incised threads and broad slotted head that can be driven as a fastener by turning with a screwdriver \* \* \*."

*American Heritage Dictionary of the English Language* 213, 1622 (3d ed. 1996), quoted in *Rocknel*, 118 F. Supp. 2d at 1241-42.

Bolt: "A rod or heavy pin (as one made of steel) designed to fasten two or more objects (as metal plates) together or to hold one or more objects in place often having a head at one end and a screw thread cut upon the other and being usually secured by a nut or by turning."

Screw: "A cylinder with a helical cut groove on the outer surface or a cone with a conical spiral groove used variously (as to fasten, apply pressure, transmit motion, or make adjustments) especially where a large mechanical advantage and irreversible motion are desired; specifically: a small cylindrical or conical metal screw with a slotted or recessed head used alone or when cylindrical with a nut to unite two objects or to fasten one or more objects usually by being rotated (as with a screwdriver)."

*Webster's New International Dictionary* 249, 2041 (3d ed. 1968).

A comparison of the ANSI Specification with the various dictionary definitions reveals that the general ANSI definitions and primary criteria, which focus on whether the fastener is designed to be torqued by tightening the head or a nut, conform well to the distinctions made in the dictionary definitions. The supplemental criteria of the ANSI specification, while not inconsistent with the dictionary definitions, contain detail that goes beyond the definitions found in both the technical and general dictionaries.

In its briefs to this court and at oral argument, *Rocknel* proposed its own definition of the term "bolt," which it contends represents the common meaning of the term. Under that definition, a bolt "includes partially threaded fasteners used to hold or fasten objects together, and capable of being torqued by the head or by the nut." That definition, which uses the term "includes" and thus is open-ended, consists of three elements: bolts are (1) partially threaded, (2) used to hold or fasten objects together, and (3) capable of being torqued by the head or by a nut. In contrast, *Rocknel* argues, "the shanks of screws \* \* \* are fully threaded from the point to the head, are sometimes pointed, are often turned with a screwdriver, and are capable of fastening or transmitting motion."

Rocknel's proposed definition has several defects. First, Rocknel's reliance on the distinction between fully and partially threaded rods is not reflected in any of the dictionary definitions. Rocknel relies for that distinction on the Explanatory Notes to the HTSUS, which were prepared by the World Customs Organization to accompany the international harmonized schedule. The Explanatory Notes, however, do not rely on partial threading as a firm criterion for classifying bolts and screws, but merely state that screws for metal are "generally threaded throughout their length whereas bolts usually have a part of the shank unthreaded." Customs Co-operation Council, *Harmonized Commodity Description and Coding System* § 73.18, Explanatory Note (A) (1988). Furthermore, although the Explanatory Notes may offer guidance in interpreting subheadings in the HTSUS, they are not considered controlling. See *Totes, Inc. v. United States*, 69 F.3d 495, 500 (Fed. Cir. 1995).

The two remaining factors in Rocknel's proposed definition of bolts—that bolts are used to fasten objects together and that they are capable of being torqued by the head or by a nut—are not at all helpful because they fail to provide any useful distinction between bolts and screws. Both screws and bolts are used to hold or fasten objects together, and all screws are capable of being torqued by the head. Rocknel's observation that screws are "sometimes" pointed and are "often" turned with a screwdriver is also unhelpful, as it does not address the circumstances in which objects that are not pointed and are not turned with a screwdriver may still be considered screws.

Because the dictionary definitions of the terms "bolt" and "screw," such as those quoted above, are not sufficiently precise to distinguish between bolts and screws in all cases, it was reasonable for Customs to adopt the definitions of "bolt" and "screw" in the ANSI Specification, which are consistent with the dictionary definitions but supplement those definitions where needed to draw fine distinctions between the two terms. Standards promulgated by industry groups such as ANSI, ASME, and others are often used to define tariff terms, see, e.g., *Hafele Am. Co. v. United States*, 870 F. Supp. 352, 355 (Ct. Int'l Trade 1994) (using ANSI/ASME Specification B18.2.1); *Wash. Int'l Ins. Co. v. United States*, 803 F. Supp. 420, 422 (Ct. Int'l Trade 1992) (using ASTM standard), *aff'd*, 24 F.3d 224 (Fed. Cir. 1994), and as noted above, Customs has applied the ANSI Specification in distinguishing between screws and bolts from a time even before the enactment of the HTSUS.

This is not a case in which there is a conflict between the dictionary meanings and a commercial standard. See *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097-98 (Fed. Cir. 1984); *Winter-Wolff, Inc. v. United States*, 996 F. Supp. 1258, 1263 (Ct. Int'l Trade 1998). Rather, it involves an authoritative industry source that is generally consistent with the dictionary definitions and has been used to supplement the dictionary definitions with additional necessary precision. See *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789-90 (Fed. Cir. 1988).



Applying the principles of deference set forth in the Supreme Court's decision in *Mead*, we conclude that Customs' construction of the statute has persuasive power and is entitled to deference. Customs' definition is consistent with the dictionary definitions, it is reflected in Customs classification rulings and a Customs publication specifically addressed to the issue, and it reflects an effort by a national standard-making organization to provide a basis for distinguishing the two types of fasteners without departing from the common understanding of the terms. Customs' choice of definitions for the terms is especially reasonable in light of the failure of the party protesting the classification to offer alternative definitions that are more consistent with the common meaning and are useful in making classification decisions. We therefore uphold the judgment of the Court of International Trade sustaining Customs' classification ruling.

### AFFIRMED.

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SHAKEPROOF ASSEMBLY COMPONENTS DIVISION OF ILLINOIS TOOL WORKS, INC., PLAINTIFF-APPELLANT v. UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 00-1521

(Decided October 12, 2001)

*Stephen M. Creskoff*, Creskoff & Doram LLP, of Washington, DC, argued for plaintiff-appellant. Of counsel was *Lisa E. Smilan*.

*Lucius B. Lau*, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief was *David M. Cohen*, Director. Of counsel were *Robert E. Nielsen*, *John D. McInerney*, and *Berniece A. Browne*, Attorneys, Department of Commerce, of Washington, DC.

Appealed from: United States Court of International Trade  
Judge JUDITH M. BARZILAY

Before CLEVENGER, SCHALL, and GAJARSA, Circuit Judges.

GAJARSA, Circuit Judge.

This case involves the appeal of the decision of the United States Court of International Trade that sustained the final antidumping determination issued by the United States Department of Commerce International Trade Administration ("Commerce"). *Shakeproof Assembly Components v. United States*, 102 F. Supp. 2d 486 (Ct. Int'l Trade 2000) ("*Shakeproof II*"). On November 19, 1997, Commerce issued its final determination regarding "Certain Helical Spring Lock Washers from the People's Republic of China." See Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 61794-801 (Nov. 19, 1997) ("Final Determination"). The antidumping determination encompasses Helical



Spring Lock Washers ("Washers") imported from Chinese manufacturer Zhejiang Wanxin Group, Ltd. ("ZWG") between October 1, 1995 and September 30, 1996. Commerce ultimately assigned an antidumping margin of 14.15% on Washers imported from ZWG during the period of review. Shakeproof Assembly Components ("Shakeproof"), a United States manufacturer of Washers, challenges the methodology used by Commerce in its final determination. Shakeproof argues that the antidumping margin should instead be approximately 38%, based on its asserted normal value of the steel wire rod ("steel") used to manufacture the Washers.<sup>1</sup>

For the reasons discussed below, we affirm.

### I. BACKGROUND

On November 19, 1997, Commerce issued its Final Determination in this case. 62 Fed. Reg. 61794-801 (Nov. 19, 1997). Shakeproof challenged the determination before the United States Court of International Trade, and disputed the methodology by which Commerce calculated the value of the steel used to manufacture the Washers. Shakeproof argued that it was improper for Commerce to determine the value of the steel based on the price paid for steel imported by ZWG from the United Kingdom. Specifically, ZWG purchased approximately one-third (34.7%) of its steel from the United Kingdom, and the remaining two-thirds (65.3%) from domestic Chinese producers. Commerce established the normal value of 100% of the steel based on the import price of the steel purchased from the United Kingdom. Shakeproof argued that the normal value of the domestically purchased Chinese steel should instead be determined based on the "factors of production" using India as a surrogate country pursuant to 19 U.S.C. § 1677b(c) (1994).

On July 29, 1999, the United States Court of International Trade remanded the case in order for Commerce to further explain "how its use of import prices to value the entire factor of production for steel wire rod promoted accuracy, including but not limited to how it was more accurate than the use of the surrogate value." *Shakeproof Assembly Components v. United States*, 59 F. Supp. 2d 1354, 1360-61 (Ct. Int'l Trade 1999) ("*Shakeproof I*"). The trial court reasoned that "[w]hether Commerce's use of imported prices to value an entire factor of production is reasonable is inextricably linked to whether the methodology promotes accuracy." *Id.* at 1358 (citing *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1445 (Fed. Cir. 1994)).

On September 27, 1999, Commerce responded to the trial court's remand order by issuing an additional explanation, entitled Final Results

<sup>1</sup> The normal value of goods in "market economy" cases is generally the price at which the foreign product is first sold in the exporting country. 19 U.S.C. § 1677b(a)(1)(B)(i) (1994). In nonmarket economies such as China, there is a presumption that exports are under the control of the state. Thus, the normal value of goods in non-market economies may be instead determined by looking at the "factors of production" used to manufacture the goods. 19 U.S.C. § 1677b(c) (1994). The "factors of production" analysis is discussed, *infra*

of Redetermination on Remand ("Remand Determination"). The Remand Determination stated:

The purpose of the factors of production methodology is to determine what [normal value] would be if the producer's costs were set by the market forces in a comparable economy. Because the import price is an actual market price paid by the [non-market economy] producer it provides a more accurate value than other potential surrogates. Therefore, the actual price paid for the imports constitutes the best available information for valuing this factor.

Commerce explained that, "the actual price paid for inputs imported from a market economy in meaningful quantities is the best available information and promotes accuracy in the dumping calculation." Commerce further stated that it would find imports "meaningful" if it could "reasonably conclude from the quantities sold, and other aspects of the transactions, that the price paid is a reliable market economy value for the input." Commerce indicated that, in the present case, ZWG purchased 65.3% of the steel from seven domestic Chinese suppliers, and imported 34.7% of the steel from the United Kingdom. Commerce also noted that the amount imported from the United Kingdom "exceeded the amounts purchased from any one of the seven" domestic Chinese suppliers. Commerce determined that ZWG imported "meaningful" amounts of identical steel from the United Kingdom. Moreover, Commerce explained why the import price was more accurate than a surrogate value:

In [non-market economy] countries we do not have market economy prices and, thus, are forced to resort to the best available information, which is often a surrogate value. At best, this surrogate value represents only an estimate of what [a non-market economy] producer might pay for the factor in question if it were operating in a market economy setting. In this case, however, we have an actual, market economy price for steel wire rod paid by the [non-market economy] producer in question. It is an actual price determined by market economy forces which has been paid to the market economy supplier by the respondent in convertible currency. Thus, the actual market economy price is both reliable and accurate.

Thus, Commerce concluded that the United Kingdom import price was a more reliable and more accurate basis for establishing the normal value of the domestic steel.

On June 9, 2000, the United States Court of International Trade affirmed the Remand Determination. *Shakeproof II*, 102 F. Supp. 2d at 496. The trial court reasoned that the Remand Determination demonstrated "how its use of import prices promotes accuracy." *Id.* at 495. Shakeproof timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (1994).

## II. STANDARD OF REVIEW

The Court of International Trade reviews Commerce's decision to determine whether it is "unsupported by substantial evidence in the re-

cord, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). We reapply this standard of review to Commerce's determination. *Cemex v. United States*, 133 F.3d 897, 900 (Fed. Cir. 1998).

We review questions of statutory interpretation without deference. *U.S. Steel Group v. United States*, 225 F.3d 1284, 1286 (Fed. Cir. 2000). In reviewing an agency's construction of a statute that it administers, this court addresses two questions as required by the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, this court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, Congress has not spoken directly on the issue, this court addresses the second question of whether the agency responsible for filling a gap in the statute has rendered an interpretation that "is based on a permissible construction of the statute." *Id.*; see also *United States v. Mead Corp.*, 121 S. Ct. 2164, 2185 (2001); *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1308 (Fed. Cir. 2001). In other words, Commerce's interpretation will not be set aside unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

In antidumping cases, this court has previously recognized "Commerce's special expertise," and it has "accord[ed] substantial deference to its construction of pertinent statutes." *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1394 (Fed. Cir. 1997). Even where Commerce has not engaged in notice-and-comment rulemaking, its statutory interpretations articulated in the course of antidumping proceedings draw *Chevron* deference. *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001) (holding that an "[a]dministrative interpretation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Am. Silicon Techs. v. United States*, 261 F.3d 1371 (Fed. Cir. 2001). See also *Pesquera Mares Australes Ltda. v. United States, et al*, No. 00-1427, 2001 WL 1117927 (Fed. Cir. Sept. 25, 2001).

### III. DISCUSSION

Commerce's decision to determine the normal value of all steel based on the purchase price of steel imported from the United Kingdom is based on its interpretation of 19 U.S.C. § 1677b(c) (1994). The statutory provision requires Commerce to determine the normal value of merchandise exported from a non-market economy country "on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1) (1994). Specifically, the statute provides:

[T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a

market economy country or countries considered to be appropriate by the administering authority.

19 U.S.C. § 1677b(c)(1) (1994) (emphasis added). In valuing the factors of production, the statute requires Commerce to:

[U]tilize, *to the extent possible*, the prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.

19 U.S.C. § 1677b(c)(4) (1994) (emphasis added).

The statutory provisions specifically authorize Commerce to use surrogate countries to estimate the value of the factors of production. However, the statute does not *require* Commerce to always use surrogate country values. The process of constructing foreign market value for a producer in a non-market economy country is difficult and necessarily imprecise. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). "While § 1677b(c) provides guidelines to assist Commerce in this process, this section also accords Commerce wide discretion in the valuation of factors of production in the application of those guidelines." *Id.* Indeed, we have specifically held that Commerce may depart from surrogate values when there are other methods of determining the "best available information" regarding the values of the factors of production. *Lasko*, 43 F.3d at 1446; *see also* *Nation Ford*, 166 F.3d at 1378 n.5 ("The statute does not preclude consideration of pricing or costs beyond the surrogate country if necessary."). In *Lasko*, Commerce issued a final antidumping determination on certain fans imported from China. In that case, Commerce determined the normal value based on both surrogate values and known prices paid for certain manufacturing supplies on the international market. We held that this methodology was a reasonable interpretation of the statutory provisions. Specifically, we reasoned:

The Act simply does not say—anywhere—that the factors of production must be ascertained in a single fashion. The Act requires the [Commerce] determination to be based on the best available information \* \* \*. In this case, the best available information on what the supplies used by the Chinese manufacturers would cost in a market economy country was the price charged for those supplies on the international market.

*Lasko*, 43 F.3d at 1446. We reasoned that the purpose of the statutory provisions is to determine antidumping margins "as accurately as possible." *Id.* We also observed that "[w]here we can determine that a [non-market economy] producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law." *Id.* (emphasis added). Thus, there is no question that Commerce may determine

the normal value of the steel imported from the United Kingdom based on the actual purchase price.

However, Shakeproof argues that Commerce improperly determined the normal value of the domestically produced steel by extrapolating the purchase price of the steel imported from the United Kingdom to the domestically produced steel. We disagree. As we observed in *Lasko*, the statute does not require the factors of production to be ascertained in a single fashion. 43 F.3d at 1446. Moreover, the statute does not require that Commerce always use surrogate country values. Indeed, the statute requires the valuation of the factors of production to be based "on the best available information." 19 U.S.C. § 1677b(c)(1) (1994). Surrogate country values represent only an *estimate* of what a non-market economy manufacturer might pay in a market economy setting. Thus, the statute recognizes that surrogate values are used only "to the extent possible." 19 U.S.C. § 1677b(c)(4) (1994).

In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible. Commerce argues that the actual price paid for inputs imported from a market economy in meaningful quantities is the best available information and promotes accuracy in the dumping calculation. Commerce notes that the value of the factors of production for domestically purchased merchandise may be obtained by extrapolating the market economy import price only when a "meaningful" amount of merchandise is imported. Although we recognize that the level of a "meaningful" amount of imported merchandise must be determined on a case-by-case basis, we are persuaded that the steel imported from the United Kingdom in this case constitutes a "meaningful" amount. The steel imported from the United Kingdom constitutes approximately one-third of all steel used by ZWG in manufacturing the Washers. Moreover, the amount of steel imported from the United Kingdom exceeds the amount purchased from any one of the seven domestic Chinese steel suppliers.

Commerce contends that using the actual import price of steel purchased from the United Kingdom is more accurate than the use of surrogate data. In *Lasko*, we recognized that surrogate country values are, at best, an *estimate* of the true value of the factors of production. 43 F.3d at 1445. In this case, however, one-third of the steel was purchased from a market economy country, with a price set by market forces in an arms length transaction. Commerce notes that the steel purchased from the United Kingdom is identical to the steel purchased from domestic Chinese suppliers. Thus, we agree that the best available and most accurate information regarding the normal value of the domestically obtained steel is the purchase price of the steel imported from the United Kingdom. Commerce's Remand Determination demonstrates that the methodology used in this case is a permissible interpretation of 19 U.S.C. § 1677b(c) (1994). *Chevron*, 467 U.S. at 843.

Shakeproof advances three additional arguments. First, Shakeproof contends that the Remand Determination is vague and does not adequately comply with the remand order issued by the Court of International Trade. Shakeproof argues that we should remand this case and instruct Commerce to more specifically show how the methodology used in this case promotes accuracy. However, we agree with the trial court, that "Commerce sufficiently followed the [c]ourt's mandate." *Shakeproof II*, 102 F. Supp. 2d at 492. The Remand Determination adequately and thoroughly explains why the methodology used in this case is more accurate than surrogate values.

Second, Shakeproof maintains that Commerce failed to assess the reliability of the import prices under the more exacting analysis described in *Olympia Indus., Inc. v. United States*, 36 F. Supp. 2d 414, 416 (Ct. Int'l Trade 1999). However, as recognized by the trial court, "a critical difference exists between the facts of *Olympia* and the facts of this case." *Shakeproof II*, 102 F. Supp. 2d at 494. In *Olympia*, Commerce used a three-part analysis to assess the reliability of import prices paid by a Chinese trading company that resold the inputs to Chinese manufacturers. In this case, however, "the [Chinese] producer purchased its steel wire rod from a market economy supplier through a market economy trading house and paid in market economy currency." *Shakeproof II*, 102 F. Supp. 2d at 494. Thus, Commerce is not required to apply the analysis used in *Olympia* to this case.

Third, Shakeproof argues that Commerce failed to verify ZWG's import data. Commerce is required to verify the information used in making a final antidumping determination if:

- (A) verification is *timely requested* by an interested party \* \* \* and
- (B) no verification was made under this subparagraph during the 2 immediately preceding reviews and determinations \* \* \* except that this clause shall not apply if good cause for verification is shown.

19 U.S.C. § 1677m(i) (1994) (emphasis added). In all cases, therefore, verification must be timely requested by an interested party. Shakeproof concedes that it did not request verification, but maintains that it did not have a reasonable opportunity to request verification because it was unaware that Commerce would use the import prices. Commerce, however, states that Shakeproof could have requested "good cause" verification during the administrative review. Shakeproof cannot now argue that the information should have been verified when it failed to timely request verification as required by statute. We also note that verification had occurred during the first administrative review. Thus, even if Shakeproof had made a request, Commerce need have only verified information upon a showing of good cause. Based on its analysis of the information, Commerce concluded that further verification was not warranted. Commerce did not abuse its discretion by determining that there was not "good cause" for further verification. *Cf. Micron Technology, Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997) (holding



that we review Commerce's verification procedures for an abuse of discretion).

#### IV. CONCLUSION

For the reasons discussed, the decision of the Court of International Trade is

#### COSTS

No costs.

#### AFFIRMED.

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THAI PINEAPPLE CANNING INDUSTRY CORP. AND MITSUBISHI INTERNATIONAL CORP., PLAINTIFFS-APPELLANTS v. UNITED STATES, DEFENDANT-APPELLEE, AND MAUI PINEAPPLE CO., LTD. AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, DEFENDANTS

Appeal No. 00-1445

(Decided December 6, 2001)

*Arthur J. Lafave, III*, Dickstein Shapiro Morin & Oshinsky LLP, of Washington, DC, argued for plaintiffs-appellants. With him on the brief were *Douglas N. Jacobson*, and *Shibani Malhotra*.

*Lucius B. Lau*, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-cross appellant. On the brief was *David M. Cohen*, Director. Of counsel were *Berniece A. Browne*, *John D. McInerney*, *David W. Richardson*, and *Scott McBride*, Attorney, Department of Commerce, of Washington, DC.

Appealed from: United States Court of International Trade

Judge JANE A. RESTANI

Before LOURIE, *Circuit Judge*, PLAGER, *Senior Circuit Judge*, and GAJARSA, *Circuit Judge*.

PLAGER, *Senior Circuit Judge*.

This case involves the determination of antidumping duties for canned pineapple fruit ("CPF") from Thailand. Thai Pineapple Canning Industry Corporation ("TPC") raises two issues on appeal from the Court of International Trade. First, TPC challenges the methodology used in this case by the Department of Commerce ("Commerce") to determine cost of production and constructed value. The question is what is the proper methodology in computing antidumping margins during a period of rising costs when there is a significant lag time between the production of merchandise and its sale. Second, TPC contends that during an administrative review of an antidumping order, Commerce should not compute a single assessment rate for the entire period of re-



view, but instead should compute two assessment rates, one for the period between Commerce's preliminary determination of sales at less than fair value and the International Trade Commission's affirmative injury determination, and a second rate for the remainder of the period of review after the Commission's injury determination. Because we conclude that Commerce's cost of production methodology is not reasonable in this case, we reverse the Court of International Trade's decision on that issue. We affirm the decision regarding the use of a single assessment rate for the entire period of review.

#### BACKGROUND

##### I.

##### A.

Commerce is required to impose an antidumping duty on imported merchandise that is being sold, or is likely to be sold, in the United States at less than fair value to the detriment of a domestic industry. 19 U.S.C. § 1673 (1994). Commerce determines the duty by calculating the dumping margin, i.e., the amount by which the "normal value" (typically the price charged for similar merchandise sold for consumption in the exporting country) exceeds the "export price" or "constructed export price" (the price charged for the subject merchandise in the United States). *Id.* § 1677(35)(A). Commerce uses the dumping margin as "the basis for the assessment of \* \* \* antidumping duties on entries of merchandise covered by the [antidumping] determination and for deposits of estimated duties." *Id.* § 1675(a)(2)(C).

Normal value preferably is based on sales of the foreign like product in the exporting country. *Id.* § 1677b(a)(1)(B). When no foreign like product is sold for consumption in the exporting country, or the quantity sold is insufficient to permit a proper comparison with sales in the United States, normal value may be based on the price at which the foreign like product is sold in a third country. *Id.* § 1677b(a)(1)(B), (C). Regardless of whether normal value is based on sales in the exporting country or in a third country, Commerce may undertake a below-cost sales investigation whenever it has reasonable grounds to believe that those sales have been made at prices less than the cost of production. *Id.* § 1677b(b). If Commerce determines that sales below the cost of production have been made within an extended period of time in substantial quantities, it may disregard such sales when determining normal value, which then will be based on the remaining sales of the foreign like product in either the exporting country or third country. *Id.* If no sales remain, normal value will be based on the constructed value of the merchandise. *Id.* § 1677b(b), (e).

Cost of production is calculated according to a statutory formula by adding together several costs and expenses, including the cost of materials, fabrication, containers, coverings, and other processing costs, and selling, general, and administrative expenses. *Id.* § 1677b(b)(3). The constructed value of merchandise, which is the basis for normal value when there are insufficient sales in the exporting country or a third

country, is the sum of the same costs and expenses used to calculate cost of production, plus realized profits. *Id.* § 1677b(e). When normal value is based on sales in the exporting country or a third country, the effect of a higher cost of production is a higher normal value because more lower-priced sales will be disregarded. When normal value is based on constructed value, the effect of a higher cost of production is also a higher normal value because cost of production is the main component of constructed value. Thus, regardless of whether normal value is based on actual sales or constructed value, a higher cost of production brings about a higher normal value, which in turn creates a higher dumping margin. It is therefore advantageous to a foreign producer to demonstrate as low a cost of production as possible.

#### B.

On July 18, 1995, Commerce published an antidumping duty order on CPF from Thailand. *Antidumping Duty Order on Canned Pineapple Fruit from Thailand*, 60 Fed. Reg. 36,775 (July 18, 1995). On August 15, 1996, Commerce initiated an administrative review of sales during the period from January 11, 1995, through June 30, 1996. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation*, 61 Fed. Reg. 42,416 (Aug. 15, 1996). As part of its review, Commerce initiated a below-cost sales investigation to determine whether TPC had sold foreign like product at prices below the cost of production.

During the administrative review, Commerce determined that TPC did not sell a sufficient amount of foreign like product in Thailand and therefore based normal value on sales prices in Germany, TPC's largest third country market. *Canned Pineapple Fruit From Thailand; Preliminary Results and Partial Termination of Antidumping Duty Administrative Review*, 62 Fed. Reg. 42,487, 42,488 (Aug. 7, 1997) ("Preliminary Results"). Commerce found that TPC made third country sales of some CPF products at prices below the cost of production and therefore excluded those sales from its normal value determination. *Id.*, 62 Fed. Reg. at 42,491. For those products with no remaining third country sales, Commerce used constructed value as the basis for normal value. *Id.*

In determining the cost of production, Commerce calculated a single average cost for the entire period of review. During the comment period following the Preliminary Results, TPC argued that a single average cost of production distorted the price comparison between normal value and the United States sales price in two ways. *Notice of Final Results of Antidumping Duty Administrative Review: Canned Pineapple Fruit From Thailand*, 63 Fed. Reg. 7392, 7399 (Feb. 13, 1998) ("Final Results"). First, because the cost of fresh pineapple increased substantially

during the period of review,<sup>1</sup> sales early in the period appeared to be below cost, while sales late in the period appeared to have high profit margins. Thus, TPC argued, Commerce should calculate separate costs of production for different fiscal years. Second, merchandise is held in inventory before sale,<sup>2</sup> so TPC argued that the assignment of fiscal year costs to sales should take into account the average inventory period. To enable that assignment, TPC had submitted cost data for 1994, which was prior to the period of review. Commerce responded that it departs from its normal methodology of calculating a single weighted average cost of production only "in unusual cases where there are substantial changes in cost, e.g., cases involving high-inflation economies." *Id.* Commerce found that the fluctuations in the cost of pineapple did not warrant special treatment. *Id.*, 63 Fed. Reg. at 7400.

TPC appealed to the Court of International Trade, challenging Commerce's calculation of a single average cost of production for the entire period of review. *Thai Pineapple Canning Indus. Corp. v. United States*, No. 98-03-00487, 1999 WL 288772 (Ct. Int'l Trade May 5, 1999) ("TPC I"). The Court of International Trade noted a number of cases in which Commerce had adjusted its methodology for changes in costs over the period of review or had matched costs to sales more accurately than in this case. Given the distortions in cost calculations caused by the price increase of fresh pineapple and the delay between production and sale of goods, the court remanded to Commerce with instructions to revisit the issue. *Id.* at \*4. Specifically, the court directed Commerce to

reanalyze the data to determine whether TPC has provided sufficient data to match costs to appropriate fiscal year sales. If it has, in the absence of any proper antidumping policy reason for not doing this seemingly minimally burdensome and substantially less distortive comparison, Commerce must proceed as it has in the past and match fiscal year costs with sales.

*Id.*

On remand, Commerce recalculated separate costs for the 1995 and 1996 fiscal years and then matched 1995 costs to 1995 sales and 1996 costs to 1996 sales. *Final Results of Redetermination Pursuant to Court Remand: Thai Pineapple Canning Industry Corp. v. United States*, No. 98-03-00487, slip op. at \*11 (Sept. 2, 1999) (unpublished, filed with the Court of International Trade) ("*Remand Results*"). In response to comments from TPC that matching sales to costs in the same time period continued to produce distorted results, Commerce reiterated its general policy of using the cost of producing merchandise during the period of review rather than the cost of producing the merchandise sold during the period of review. *Id.* at \*27. Commerce conceded that the statute,

<sup>1</sup> The Court of International Trade described the increase as "almost fifty percent." *Thai Pineapple Canning Indus. Corp. v. United States*, No. 98-03-00487, 1999 WL 288772, at \*3 (Ct. Int'l Trade May 5, 1999) ("TPC I"). Commerce has not challenged that figure in this appeal. TPC's detailed calculations of increases in fresh pineapple costs are confidential and therefore omitted from this opinion. That information may be found in the confidential version of TPC I, No. 98-03-00487, slip. op. at 6-7, n.4.

<sup>2</sup> The typical inventory period of TPC's merchandise prior to sale is confidential and therefore omitted from this opinion. That information may be found in the confidential version of TPC I, slip. op. at 8, n.5.

which provides that costs are determined "during a period which would ordinarily permit the production of [the merchandise] in the ordinary course of business," 19 U.S.C. §§ 1677b(b)(3)(A), 1677b(e)(1), is broad enough to allow for either approach. Nevertheless, Commerce stated that it will not stray from its normal practice except in cases with unique circumstances, which it maintained are not present in this case. *Remand Results* at \*27-28.

TPC appealed again to the Court of International Trade, which this time agreed with Commerce. *Thai Pineapple Canning Indus. Corp. v. United States*, No. 98-03-00487, 2000 WL 174986, at \*3-5 (Ct. Int'l Trade Feb. 10, 2000) ("*TPC II*"). The court concluded that the use of separate 1995 and 1996 costs sufficiently accounted for the rising pineapple costs and complied with its remand instruction, and the court determined that the facts of this case did not warrant further modification of Commerce's methodology. *Id.* at \*5. TPC appeals that decision to this court.

## II.

Once Commerce makes a preliminary determination that merchandise is being sold in the United States at less than fair value, Commerce orders the posting of a cash deposit or bond for each entry of merchandise at a rate based on the preliminary estimated dumping margin. 19 U.S.C. § 1673b(d)(1)(B) (1994). After Commerce makes a final determination that the subject merchandise is being sold at less than fair value, *id.* § 1673d(a), and the International Trade Commission makes a final determination that an industry is materially injured, *id.* § 1673d(b), Commerce publishes an antidumping order with a new assessment rate based on the dumping margin determined during Commerce's investigation. *Id.* § 1673e(a). For entries of merchandise after Commerce's affirmative preliminary determination and before the Commission's affirmative injury determination, if the deposit of estimated duty under § 1673b(d)(1)(B) is higher than the duty under the antidumping order, the difference is refunded. 19 U.S.C. § 1673f(a) (Supp. V 1999). On the other hand, if the deposit is lower than the duty under the order, the difference is disregarded. *Id.* That is, the preliminary estimated duty acts as a "cap" on the duty that can be collected for entries made between the date of Commerce's preliminary determination and the date of the Commission's injury determination, often referred to as the "cap period."

In the case at hand, the cap period ran from January 11, 1995 to July 19, 1995. The period of review for Commerce's administrative review included the cap period and continued until June 30, 1996. In its administrative review, Commerce considered all sales made during the period of review and calculated a single assessment rate for the entire period of review. TPC challenged that determination, arguing that Commerce was required to compute two separate assessment rates, one based on sales during the cap period, and the other based on sales during the remainder of the period of review. *TPC I*, 1999 WL 288772, at \*9-10. The

Court of International Trade affirmed Commerce's methodology, noting that the cap is a limitation on collection during the cap period, unrelated to the determination of an antidumping duty in an administrative review pursuant to 19 U.S.C. § 1675(a). *Id.* at \*10. TPC appeals that decision to this court.

## DISCUSSION

### I.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(5) (1994). We review antidumping determinations made by Commerce by applying anew the standard of review applied by the Court of International Trade. *Inland Steel Indus. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999). Accordingly, we will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

The Government argues that the methodology used by Commerce should receive deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001), a decision issued after briefing and oral argument in this case, the Supreme Court made it clear that an agency's statutory interpretations are due *Chevron* deference when articulated in "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement" having the force of law. 121 S. Ct. at 2172. We have subsequently held that statutory interpretations articulated by Commerce in antidumping determinations qualify for *Chevron* deference. *Pesquera Mares Australes v. United States*, 266 F.3d 1372, 1379-82 (Fed. Cir. 2001). Whether Commerce is entitled to *Chevron* deference or review under the less deferential regime set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), is of no moment to this case, however. Under either, if the Government's position is unreasonable, deference does the agency no good.

### II.

The first issue before us is whether, on the facts of this case, Commerce is required to modify its methodology for matching costs to sales in its determination of dumping margins when the cost of the main raw ingredient, fresh pineapple, increased by a substantial amount before and during the period of review, and when the merchandise was held in inventory for a period of time before sale. Commerce has already revised its methodology once as instructed by the Court of International Trade in *TPC I*, dividing the period of review into two periods for purposes of calculating costs of production instead of computing a single average cost for the entire period of review. This change addressed the first problem presented by TPC—the increase in the cost of fresh pineapple during the period of review. TPC alleges that its dumping margins will continue to be distorted unless Commerce addresses the second pro-

blem—the delay between production and sale while merchandise remains in inventory.

TPC urges that the statutory language itself requires Commerce to match sales with costs calculated for a period during which the merchandise sold was actually produced, thus taking into account the inventory time. Cost of production is defined by statute as “the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, *during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business*,” plus additional overhead and incidental expenses. 19 U.S.C. § 1677b(b)(3) (emphasis added). The definition of constructed value contains similar language, the word “merchandise” replacing “foreign like product.” *Id.* § 1677b(e). In TPC’s view, the only period of time that would “ordinarily permit” production is the period during which the imported goods under consideration were actually produced.

We do not read the statutory language as specifying the period to be used when determining costs, and no other statute or regulation provides further guidance. Moreover, the statute does not dictate the methodology for calculating cost of production and constructed value or for matching those costs against sales. Because we conclude that the statute does not clearly decide the matter, our next task is to determine whether Commerce’s methodology is a reasonable interpretation of the statute. (No one questions Commerce’s delegated authority to interpret the statute in the first instance.)

Under its standard methodology, Commerce determines cost of production by calculating a single weighted-average cost for the period of review. *Final Results*, 63 Fed. Reg. at 7399. Believing that the cost structure in place during the period of review is usually adequate for calculating the cost of production in the ordinary course of business, Commerce purports to depart from its standard methodology only in “certain rare situations where cost and price averages calculated over the entire period [do] not permit an appropriate comparison.” *Id.* Nevertheless, TPC and the Court of International Trade have identified numerous cases in which Commerce adjusted its methodology in order to better match costs with prices.

One adjustment made by Commerce is the use of shorter cost reporting periods when, for example, prices have moved significantly during the period of review. See, e.g., *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Static Random Access Memory Semiconductors From Taiwan*, 62 Fed. Reg. 51,422, 51,424 (Oct. 1, 1997) (using quarterly cost periods when sales prices declined significantly). TPC received the benefit of such an adjustment when Commerce calculated costs for separate fiscal years after remand from the Court of International Trade. Another adjustment is the lagging of costs when there is a delay between production and sales of goods in order to capture the actual costs of reported sales. See, e.g., *Final Determination of Sales at Less Than Fair Value:*



*Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea*, 58 Fed. Reg. 15,467, 15,473 (Mar. 23, 1993) ("*DRAMs from Korea*") (lagging costs for the length of time it takes for assembly and test and for average inventory holding periods when prices were declining); *Fresh and Chilled Atlantic Salmon From Norway*; *Final Results of Antidumping Review*, 58 Fed. Reg. 37,912, 37,912-13 (July 14, 1993) ("*Salmon from Norway*") (matching sales to actual costs incurred before the period of review because growth cycle of salmon was 18-24 months); *Final Determination of Sales at Less Than Fair Value*; *Sweaters Wholly or in Chief Weight of Man-Made Fiber From Taiwan*, 55 Fed. Reg. 34,585, 34,596 (Aug. 23, 1990) ("*Sweaters from Taiwan*") (using actual costs incurred for each production run).

Commerce asserts that the language of 19 U.S.C. §§ 1677b(b)(3) and 1677b(e) is broad enough to allow its standard methodology of computing a single weighted-average cost for the period of review or any other methodology adjusted to better match costs with sales, including the use of the cost of the actual merchandise sold during the period of review. While we agree that the statutory language leaves room for some discretion by Commerce in determining the cost period, the standard methodology may not be permissible in all scenarios because Commerce has recognized that certain circumstances warrant exceptions. The question we must answer is whether Commerce's application of its standard methodology to this case, modified by the use of two cost periods but not matching actual costs to sales, falls within the range of permissible construction of the statute.

This case includes two elements not present in most antidumping determinations: a dramatic change in the cost of the product's main raw input, and a significant delay between production and sale of the product. These two factors together operate to distort the calculation of dumping margins. Splitting the period of review into two cost periods has eliminated some of the distortion caused by the increase in pineapple costs, but the problem can be remedied only by using the cost of actual merchandise sold during the period of review, even though it requires the use of costs outside the period of review. While factual distinctions between cases can almost always be found, this case is no different in principle from cases in which Commerce has modified its approach. Salmon and sweaters may have their peculiar characteristics, yet one of the reasons given for using actual costs in *Salmon from Norway* is similar to this case—the fluctuation of costs during the period of review. 58 Fed. Reg. at 37,913. Most compelling is *DRAMs from Taiwan*, in which Commerce lagged costs to account for inventory periods—essentially what TPC has requested in this case. See 58 Fed. Reg. at 15,473. The decrease in sales price of the subject merchandise in *DRAMs* has an effect similar to the increase in cost in this case, and we see no basis for Commerce's disparate treatment of the two cases.

The statutory language regarding cost of production and constructed value gives Commerce some latitude in determining costs and using



those costs to derive dumping margins. While various methodologies are permitted by the statute, it is possible for the application of a particular methodology to be unreasonable in a given case when a more accurate methodology is available and has been used in similar cases. That is the situation presented by this case. Because we conclude that Commerce's failure to account for inventory holding time during a period of rising costs is unreasonable in this case, we reverse the decision of the Court of International Trade sustaining the methodology used by Commerce to determine TPC's cost of production and constructed value. We remand to the Court of International Trade with instructions to require Commerce to match sales of goods to costs based on the period in which those goods were manufactured, taking into account the inventory period.

### III.

During the administrative review, Commerce determined TPC's assessment rate by first determining the normal value and export price (or constructed export price) of each entry of the subject merchandise during the period of review and calculating the dumping margin for each entry in accordance with 19 U.S.C. § 1675(a)(2)(A). Commerce then calculated an average assessment rate for the entire period of review by dividing the dumping margin on the subject merchandise by the entered value of the merchandise, in accordance with Commerce's established practice at the time and a more recent regulation, 19 C.F.R. § 351.212 (2001). *Final Results*, 63 Fed. Reg. at 7393. TPC contends that the use of a single assessment rate for the entire period of review violates relevant statutory provisions and that Commerce is required to compute separate assessment rates for the cap period and the remainder of the period of review.

TPC's concern stems from the particular facts of this case. According to TPC, its highest dumping margins, as determined by the administrative review, occurred during the cap period, approximately the first third of the period of review. *Final Results*, 63 Fed. Reg. at 6393. Dumping margins of entries during the remainder of the period of review were lower. Thus, under Commerce's method of calculating a single assessment rate based on all dumping margins during the period of review, entries during the cap period contribute to a higher average assessment rate for the period of review. If Commerce calculated separate assessment rates based on entries during the cap period and those during the remainder of the period of review, as TPC advocates, the cap period would have an assessment rate higher than the average assessment rate calculated by Commerce, and the remainder of the period of review would have a lower assessment rate. But because the collected duty is capped in accordance with 19 U.S.C. § 1673f(a) at a very low rate for entries during the cap period, TPC's overall assessment would decrease.

TPC contends that 19 U.S.C. §§ 1675(a)(2) and 1673f(a) read together require Commerce to compute two separate assessment rates. Under TPC's interpretation of those statutes, because § 1675(a)(2)(A) requires Commerce to determine the dumping margin for each entry during the

cap period, it follows that Commerce is required to calculate the duty to be assessed on an entry-by-entry basis. Furthermore, § 1673f(a) instructs Commerce to disregard the difference between the duty for entries during the cap period and the estimated duties deposited on those entries. According to TPC, the only way to comply with both provisions is to determine two assessment rates—one for the cap period and one for the remainder of the period of review.

We disagree with TPC's reading of the statutes. While § 1675(a)(2) requires Commerce to determine dumping margins for each entry, there is no requirement that assessment rates or duties be determined for each individual entry. Commerce's method of calculating an average assessment rate for the entire period of review by dividing the dumping margins of all entries by the entered value of all entries complies with 19 U.S.C. § 1675(a)(2)(C), which requires only that the calculated dumping margins be the "basis for the assessment" of antidumping duties.

Furthermore, § 1673f(a) does not impact the review and determination of antidumping duties during an administrative review under § 1675(a)(2). Section 1673f(a) relates to the deposit of an estimated dumping duty, required under 19 U.S.C. § 1673b(d) as security after an affirmative preliminary determination by Commerce. When an exporter deposits an estimated duty for entries during an investigation, the cap provision prohibits the collection of the difference between the duty determined by the investigation and the deposited amount. *See Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1098–99 (Fed. Cir. 1996) (discussing compliance with GATT limitation on collection of difference between posted security and final duty). Section 1673f(a) does not affect the duty for entries during the cap period; it simply limits the amount of that duty that can be collected. Thus, when Commerce determines a new duty as the result of an administrative review that is higher than the deposit of the estimated duty, the difference cannot be collected, and the duty for entries during the cap period is still capped in compliance with § 1673f(a).

Accordingly, we affirm the Court of International Trade's decision that Commerce's use of one assessment rate comports with the relevant statutes. We also reject, as did the Court of International Trade, TPC's alternative argument that Commerce should calculate different assessment rates for its two affiliates. Because most of one affiliate's sales occurred during the cap period and most of the other's sales occurred during the post-cap period, TPC's argument is essentially another attempt to obtain different assessment rates for the cap period and the post-cap period.

#### CONCLUSION

We affirm the judgment of the Court of International Trade upholding Commerce's determination of a single assessment rate for the entire period of review. Because we conclude that Commerce's failure to modify its methodology for matching costs to sales in this case is unreasonable, and thus not within the range of permissible interpretation of

the statute, we reverse the judgment of the Court of International Trade upholding Commerce's methodology and remand with instructions to remand to Commerce for further proceedings consistent with this opinion.

#### COSTS

Each party shall bear its own costs.

#### AFFIRMED-IN-PART, REVERSED-IN-PART, AND REMANDED

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MITSUBISHI HEAVY INDUSTRIES, LTD., PLAINTIFF, AND TOKYO KIKAI SEISAKUSHO, LTD., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE, AND GOSS GRAPHICS SYSTEMS, INC., DEFENDANT-APPELLEE

Appeal No. 01-1017

(Decided December 28, 2001)

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*James H. Holl, III*, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee United States. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director; and *Velta A. Melnbrensis*, Assistant Director. Of counsel on the brief were *John D. McInerney*, Acting Chief Counsel; *Berniece A. Browne*, Senior Counsel; and *Robert J. Heilferty*, Senior Attorney, Office of Chief Counsel for Import Administration, Department of Commerce, of Washington, DC.

*Charles Owen Verrill, Jr.*, Wiley, Rein & Fielding, of Washington, DC, for defendant-appellee Goss Graphic Systems, Inc. With him on the brief were *Alan H. Price*, and *Timothy C. Brightbill*.

Appealed from: United States Court of International Trade  
Judge DONALD C. POGUE

Before MAYER, *Chief Judge*, NEWMAN and CLEVENGER, *Circuit Judges*.

CLEVENGER, *Circuit Judge*.

In the latest chapter in this long-running battle over the United States Department of Commerce's assessment of antidumping duties against Mitsubishi Heavy Industries ("MHI") and Tokyo Kikai Seisakusho ("TKS") for their United States sales of large newspaper printing presses ("LNPPs"), TKS appeals from the final judgment of the Court of International Trade affirming the dumping determination. On appeal, TKS contests the Department of Commerce's determination that Japanese market LNPPs are a foreign like product under 19 U.S.C. § 1677b(e)(2)(A). Because we conclude that the Department of Commerce's determination was supported by substantial evidence, and be-

cause TKS's allegations regarding the agency's statutory construction are not properly before us, we affirm.

## I

### BACKGROUND

This case involves large newspaper printing presses exported to the United States from Japan. Although all LNPPs have similar design and function, individual LNPPs are custom-made per the customer's specification. The companies provide their customers with a menu of various components that can be built into the machine, and the customer decides what components to order. As a result, individual orders for LNPPs can vary to a greater or lesser extent, depending on what components the customer chooses. Because Japanese and United States newspapers have somewhat different characteristics in terms of size, use of color, etc., the LNPPs used to produce them also have somewhat different components. Thus, every contract for sale of an LNPP contains different terms—including price terms—because the LNPPs themselves have different components from contract to contract.

Upon a petition by Rockwell Graphics Systems, Inc., a U.S. competitor now known as Goss Graphics Systems, Inc. ("Goss"), the Department of Commerce ("Commerce") launched an antidumping investigation of two manufacturers, MHI and TKS. In due course, Commerce issued its final antidumping determination finding sales at less than fair value and announcing a dumping margin of 56.28 percent for TKS, the appellant here. *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 61 Fed. Reg. 38,139 (Dep't Commerce, July 23, 1996) ("*Japan Final*"), amended by 61 Fed. Reg. 46,621 (Dep't Commerce, Sept. 4, 1996) (antidumping duty order and amendment to final determination). In *Japan Final*, Commerce used constructed value ("CV") to calculate the dumping margin, see *Japan Final*, 61 Fed. Reg. at 38,140, and it used home market (*i.e.*, Japanese) LNPPs as the foreign like product in its determination of profit, which is one component of CV, see 19 U.S.C. § 1677b(e)(2) (1994), despite having earlier found that direct price-to-price comparisons with home market LNPPs were impracticable as a basis for normal value—a finding that led to its original decision to use CV as a basis for normal value.<sup>3</sup> See *Japan Final*, 61 Fed. Reg. at 38,146.

TKS and MHI appealed numerous aspects of Commerce's determination in *Japan Final*, including its foreign like product determination. See *Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp. 2d 807, 810, 828 (Ct. Int'l Trade 1988) (*Mitsubishi I*). TKS, in particular, argued that Commerce's reliance upon 19 U.S.C. § 1677b(e)(2)(A) to calculate profit was inappropriate because "the findings that led Commerce to rely on CV rather than home-market sales in calculating normal value

<sup>3</sup> In order to make a dumping determination, Commerce must compare the export price to the goods' normal value. 19 U.S.C. § 1677b(a) (1994). The dumping margin is the amount by which normal value exceeds the price charged in the United States. Normal value is either the goods' price in the home market or its export price to countries other than the United States. *Id.* § 1677b(a)(1). When Commerce cannot determine the home market price, it may base normal value on CV. *Id.* § 1677b(a)(4).

constitute[d] evidence that no foreign like product exist[ed] in the home market." *Mitsubishi I*, 15 F. Supp. 2d at 828-29. The profit calculation under § 1677b(e)(2)(A) relies upon sales of "a foreign like product." 19 U.S.C. § 1677b(e)(2)(A) (1994). Because Commerce did not describe adequately its profit calculation so as to permit judicial review, the Court of International Trade remanded the case to Commerce to explain upon which of the three statutory definitions of foreign like product it relied to make its profit calculation. *Mitsubishi I*, 15 F. Supp. 2d at 829. In its remand determination, Commerce explained that it had relied upon the definition of foreign like product in 19 U.S.C. § 1677(16)(C), which requires, *inter alia*, that the foreign like product be merchandise that "the administering authority determines may reasonably be compared with" the exported merchandise subject to the investigation. 19 U.S.C. § 1677(16)(C)(iii) (1994).

TKS and MHI appealed the remand determination, and the Court of International Trade remanded again, this time because Commerce failed to explain the factual basis for its determination that the LNPPs sold in Japan and the United States could "reasonably be compared" as required by 19 U.S.C. § 1677(16)(C)(iii). *Mitsubishi Heavy Indus., Ltd. v. United States*, 54 F. Supp. 2d 1183, 1197 (Ct. Int'l Trade 1999) (*Mitsubishi II*). The Court of International Trade was troubled because in its first remand determination, Commerce made statements that made it appear that it had previously conducted a difmer analysis<sup>4</sup> and concluded that the home market and export LNPPs could not reasonably be compared. *See id.* at 1197. In its second remand determination, Commerce clarified that it had not conducted a difmer analysis. *Second Remand Determination* at 2-3. In addition, Commerce explained the factual basis for its finding that the home-market LNPPs could "reasonably be compared" with their United States counterparts, which included the common use to which the products are put (*i.e.*, printing newspapers) and TKS's and MHI's responses to detailed questionnaires showing that the Japanese and United States LNPPs share the same set of detailed press characteristics. *Id.* at 11-12.

Based on Commerce's explanation of the factual basis underlying its comparability determination, the Court of International Trade affirmed the dumping determination. *Mitsubishi Heavy Indus., Ltd. v. United States*, 97 F. Supp. 2d 1203, 1209 (Ct. Int'l Trade 2000) (*Mitsubishi III*). The court denied TKS's motion for reconsideration, *Mitsubishi Heavy Indus., Ltd. v. United States*, 112 F. Supp. 2d 1170, 1175 (Ct. Int'l Trade 2000) (*Mitsubishi IV*), and this appeal by TKS followed. We exercise jurisdiction over this appeal from a final decision of the United States Court of International Trade pursuant to 28 U.S.C. § 1295(a)(5).

<sup>4</sup> When the foreign merchandise is not identical to the exported goods, Commerce may conduct a "difmer" analysis, which "adjusts normal value for the 'difference in cost attributable to the difference in physical characteristics'—the difference in merchandise ('difmer') adjustment." *Mitsubishi Heavy Indus., Ltd. v. United States*, 97 F. Supp. 2d 1203, 1206 n.4 (Ct. Int'l Trade 2000). If the "difmer" exceeds 20 percent, Commerce will make a finding that the merchandise cannot be reasonably compared, unless it can otherwise justify the comparison. In other words, a > 20% difmer finding creates a presumption of noncomparability. *Id.* Obviously the difmer analysis is conducted—if at all—prior to a decision to use CV, because the difmer adjustment is made to normal value, not CV.

## II

## A

We review a decision of the Court of International Trade evaluating an antidumping determination by Commerce by reapplying the statutory standard of review that the Court of International Trade applied in reviewing the administrative record. *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997). We will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); see *Micron Tech.*, 117 F.3d at 1393.

On appeal, TKS primarily argues that Commerce's determination that home and United States market LNPPs may reasonably be compared is not supported by substantial evidence. We note that in pursuing this argument, TKS has chosen a course with a high barrier to reversal. The Supreme Court has defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The conclusion reached by Commerce need not be the only one possible from the record, for "[e]ven if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce's determination from being supported by substantial evidence." *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); see also *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966). After reviewing the record, we conclude that substantial evidence supports Commerce's determination that home-market LNPPs are a foreign like product.

In its second remand decision, Commerce clarified the evidence underlying its decision to use home-market LNPPs as the foreign like product, explaining that "TKS's home market LNPP may reasonably be compared to its sales of LNPP in the United States based on evidence that LNPP in both markets share detailed product characteristics." *Second Remand Determination* at 2. Commerce noted that its conclusion was further "supported by the common use—to produce newspapers—to which both home market and U.S. LNPP are employed." *Id.* at 11. During the investigation, both TKS and MHI responded to a questionnaire sent by Commerce asking them to identify both United States and home-market LNPPs using the same set of detailed press characteristics. *Id.* TKS's and MHI's responses to this questionnaire, which indicated that their United States and home-market LNPPs do in fact share a majority of the same—or highly similar—characteristics, provide the principal factual predicate for Commerce's finding. TKS argues that this evidence is "self-serving" because Commerce prepared the questionnaire itself, forcing TKS and MHI to describe their Japanese and United States products using the same characteristics. To the extent that TKS accuses Commerce of stacking the deck against them, its argument is not well taken. As the agency to which Congress delegated the



authority to determine antidumping duties, Commerce is responsible for gathering information to make dumping determinations. Commerce uses the information it collects in order to reach its decision—in this case that the home-market and United States LNPPs are reasonably comparable. Although Commerce is an agent of the United States government, it nevertheless makes its dumping determination based on an impartial analysis of the evidence. Furthermore, administrative acts by Commerce enjoy a presumption of regularity that includes, in this case, impartiality in its decision-making process, and one seeking to rebut that presumption carries a heavy burden. See *Skinner v. United States*, 594 F.2d 824, 830 (Ct. Cl. 1979). There is no evidence to suggest that Commerce made up its mind in advance and cunningly planned its questionnaire to support its position.

MHI's and TKS's responses to Commerce's information-gathering request provide ample support for Commerce's finding.<sup>3</sup> First, the questionnaire responses confirm "that the LNPP sold in Japan and the LNPP sold in the United States share the detailed press characteristics that [Commerce] set out in its questionnaire." *Second Remand Determination* at 11. And within each characteristic, the responses indicated that the individual specifications for each press characteristic were also similar. Obviously, because the LNPPs are custom-made, each individual LNPP may contain a different mix of these common characteristics. However, it is apparent that they all reflect a choice from among similar characteristics. Based on the long list of shared features, Commerce could reasonably conclude that Japanese and United States LNPPs could reasonably be compared for calculating CV profit.

TKS retorts that whatever the value of the questionnaire, Commerce did not consider the whole record when making its comparability determination, because the weight of evidence points the other way. First, TKS notes that United States LNPPs often contained significantly more individual components than did their Japanese counterparts. However, because profit is calculated as a percentage of the sale price, the fact that Japanese LNPPs may have fewer components (and thus, perhaps, a lower overall price) is immaterial. The individual differences between the United States and Japanese models that TKS cites are significant (for example, the United States units use "tower printing units" instead of the "satellite printing units" and "spot color units" more prevalent in Japan). However, such differences are unavoidable in customized equipment. That a United States buyer chooses a somewhat different mix of components than does a Japanese one may preclude price-matching the two contracts, but it does not mean that the machines themselves may not reasonably be compared.

TKS also takes umbrage at Commerce's reference to the English-language and Japanese-language Spectrum product brochures that TKS submitted in response to Commerce's demand to provide all brochures

<sup>3</sup> Because the parties have requested confidential treatment for the most salient examples of their questionnaire responses, of necessity we do not offer a detailed discussion of those responses in this opinion.



relating to the merchandise under investigation. Commerce cited the brochures as an example of an LNPP model—the Spectrum model—marketed in both the United States and Japan, and noted that the Japanese and English versions of the brochure were identical. TKS argues that this brochure does not show that all United States Spectrums have identical characteristics as their Japanese counterparts, and that Commerce erred in citing the brochures as evidence of comparability.<sup>4</sup> But this is simply another way of saying that the Spectrums, like all LNPPs, are custom-made. The critical point is, given that individual differences exist from order to order, can the custom-made merchandise from Japan and the United States be reasonably compared? Commerce, looking at a brochure offering identical menus of features to Japanese and United States purchasers, could reasonably conclude that one Spectrum LNPP described in the brochure would be reasonably—not perfectly, not identically, but reasonably—comparable to any other Spectrum model.

In short, TKS does not provide any compelling evidence to suggest that Commerce neglected its duty to base its decision on the whole record. To the extent that TKS urges that the evidence before Commerce could be open to multiple interpretations, its argument does not require, or even allow, reversal. See *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (noting that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence” (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938))). Obviously, TKS draws a different conclusion from the evidence of the variations between individual product specifications than did Commerce, but that cannot—and does not—mean that Commerce’s interpretation should be overturned. Accordingly, we hold that substantial evidence supported Commerce’s decision to treat Japanese market LNPPs as the foreign like product for its determination in this case.

## B

This brings us to TKS’s second ground for reversal, that Commerce’s foreign like product determination was not in accordance with law because it applied an incorrect interpretation of the relevant statutory provision defining foreign like product.

<sup>4</sup> TKS also argues in its brief that reliance on the similarities between the Japanese and English Spectrum brochures is improper because the English brochure is a mere translation of the Japanese brochure, “submitted as a requirement of the Department to translate all submitted documents into English.” This argument is particularly disingenuous in light of statements made by TKS to Commerce during the investigation. TKS submitted the brochures in response to Commerce’s request to “[p]rovide all catalogs and brochures issued by your firm and affiliates that include the merchandise under investigation sold by your firm in the United States and in the comparison market. If translating the comparison market catalogs and brochures is burdensome, contact the official in charge.” TKS produced the English brochure and the Japanese brochure in response to this request, because, in TKS’s own words, the brochures described “merchandise under investigation that are sold by TKS in the United States and Japan \* \* \*.” TKS further explained that “[w]hile TKS has included copies of its Japanese brochures in their original language, TKS believes that they are essentially identical for purposes of this investigation to the English versions of the brochures that are being produced and, as a result, that it is not necessary to translate such brochures from Japanese into English.” In other words, TKS’s response demonstrates that the English brochures were independently responsive to Commerce’s brochure request and were not mere translations of the Japanese brochures, although the similarities between the two brochures fortuitously saved TKS from the burden of translating its Japanese brochure.

The Tariff Act provides three definitions of foreign like product. See 19 U.S.C. § 1677(16)(A)–(C) (1994 and Supp. V 1999). Commerce relied upon the third and broadest of the three possibilities. The Act provides in relevant part that a foreign like product is “[m]erchandise—(i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise, (ii) like that merchandise in the purposes for which used, and (iii) which the administering authority determines *may reasonably be compared* with that merchandise.” *Id.* § 1677(16)(C) (emphasis added). Commerce concluded that TKS’s and MHI’s home market LNPPs meet this definition, including the requirement that they “may reasonably be compared” with the United States merchandise. TKS has consistently argued that its home market LNPPs may not be reasonably compared with its exports to the United States, and it continues to press that argument on appeal. As discussed above, we reject the first component of this argument, *i.e.*, that Commerce’s determination is not supported by substantial evidence, and we now proceed to the second component, which involves Commerce’s interpretation of the reasonable comparability prong of the foreign like product definition. In its second remand determination, Commerce opined that the reasonable comparability prong “must be interpreted based on context of the statutory provision to which the phrase is being applied.” *Second Remand Determination* at 5. On appeal, TKS contends that this interpretation improperly varies depending upon the subsection of the statute to which the foreign like product determination is applied, and that Commerce’s incorrect construction of the statute requires reversal of its foreign like product determination.

To understand the basis for TKS’s allegation, it is necessary to describe the context in which Commerce articulated its flexible construction of the statute. In *Mitsubishi II*, the Court of International Trade directed Commerce to explain the factual basis for its determination that home market LNPPs could “reasonably be compared” with the subject LNPPs. *Mitsubishi II*, 54 F. Supp. 2d at 1197. This order was necessary because Commerce made ambiguous statements in its background section that suggested, in the Court of International Trade’s view, that Commerce made a final difmer determination of >20%, giving rise to a presumption that the home market was not reasonably comparable to the exported LNPPs. *Id.* This presumption, if Commerce made it, would be inconsistent with finding the home market to be reasonably comparable for purposes of making a foreign like product determination. The Court of International Trade realized that the >20% difmer policy is only a guideline, but stated that after finding a difmer of over 20 percent, Commerce must affirmatively demonstrate why the merchandise is nevertheless reasonably comparable. *Id.* at 1196. This Commerce failed to do, necessitating a remand.

On remand, Commerce responded to the Court of International Trade’s order by explaining that it never conducted a difmer analysis, and thus never made a presumptive finding of noncomparability. *Sec-*

ond Remand Determination at 4. The reference to the difmer analysis in its first remand determination, explained Commerce, was purely background information—an assertion supported both from its context and from its location in the “Background” section of the first remand determination. See *First Remand Determination* at 15. But after providing this explanation, Commerce engaged in a lengthy, and seemingly unnecessary, discussion of why it was appropriate to construe the statutory term “may reasonably be compared” differently depending on the context in which the definition of foreign like product will be applied. The discussion of the flexible construction was unnecessary because, as discussed below, Commerce never used differing meanings of the reasonable comparability prong in this investigation. Nevertheless, TKS’s challenge to the legal underpinnings of Commerce’s foreign like product determination springs from Commerce’s articulation of this somewhat novel interpretation of the statute.

The Court of International Trade expressed concern with Commerce’s statutory construction, but ultimately declined to reach the issue because it concluded that regardless of Commerce’s proposed construction, “it was apparent that Commerce had not in fact applied the reasonable comparability prong inconsistently in its investigation of Japanese LNPPs. Therefore, the issue was not directly before us.” *Mitsubishi IV*, 112 F. Supp. 2d at 1174. We agree with the Court of International Trade that the statutory construction issue is not ripe for decision, because TKS does not present, and our independent review does not reveal, any evidence of an inconsistent application of the statute in the case now on appeal. Instead, TKS argues that when Commerce initially decided to use CV instead of price-to-price comparisons, it necessarily found that home market LNPPs were not reasonably comparable to the exported LNPPs. Then, goes the argument, Commerce reversed itself and found them comparable for purposes of its foreign like product determination. TKS accuses Commerce of using its “flexible” statutory construction to arrive at inconsistent foreign like product determinations in its CV profit determination and its decision memorandum adopting CV over price-to-price comparisons. Careful examination of the allegedly inconsistent uses reveals, however, that TKS is chasing a phantom inconsistency in this case.

Commerce explained its decision to use CV rather than price-to-price comparisons in its November 9, 1995, decision memorandum. Commerce began by noting that “[t]he issue of the usability of the foreign like product in determining normal value (NV) in this case is two-fold: (1) whether or not price-to-price comparisons based on disaggregation of contract prices are feasible; and (2) whether or not price-to-price comparisons are technically feasible.” Throughout the decision memorandum, Commerce uses the term “foreign like product” to refer to LNPPs sold in the Japanese market. Indeed, it uses “home market” and “foreign like product” interchangeably in the decision memorandum. Thus, contrary to TKS’s allegation, Commerce used home market LNPPs as

the foreign like product both for purposes of its decision on price-to-price comparisons and for its CV profit determination. Far from demonstrating an allegedly improper inconsistency of application, the decision memorandum highlights a consistent use of the statute, because Commerce used the same Japanese LNPP foreign like product both to determine whether TKS's home market was viable and to calculate CV profit.

In the decision memorandum, Commerce proceeds to describe the statutory guidelines for determining normal value, as set forth in 19 U.S.C. § 1677b(a)(1). As noted by Commerce, this section "establishes general rules for determining when the Department may base normal value on home market sales in the exporting country," a determination Commerce calls the "viability test." Commerce found, and TKS concedes, that the home market was viable. But Commerce noted that "[c]onsistent with the new statute \* \* \* and notwithstanding the results of the above-described 'viability test,' the Department may determine that home market sales are inappropriate as a basis for determining [normal value] if the particular market situation would not permit a proper comparison." Commerce devoted the rest of its decision memorandum to an analysis of the particular market situation with respect to LNPPs. It explained that many factors underlie the "particular market situation" decision, the most important of which are "(1) the unique demand pattern prevalent in each national market; (2) the unique technical specifications required for each customized product sold; and (3) the very low volume of individual LNPP sales in the normal business cycle." The problem with direct price-to-price comparisons was that because each LNPP is custom made, Commerce would have to deconstruct each contract into its component parts, conduct a difmer analysis for each part, and then perform the overall comparison. After an exhaustive analysis, Commerce concluded that even if deconstruction were feasible (which it doubted), the actual calculation "would become an analytical exercise equivalent to the use of constructed value." In other words, the number of individual difmer adjustments that would be required for actual price-to-price comparisons was great enough that it would be more efficient simply to use constructed value. Importantly, this does not mean that the home market cannot reasonably be compared to the exported goods—it simply means that any comparison should use CV rather than direct price-to-price comparisons of individual models.

TKS claims that in the decision memorandum Commerce concluded "that the LNPPs sold to the home market are not 'reasonably comparable' to the LNPPs sold to the United States for 'price comparison purposes.'" TKS's argument has no merit because it does not reflect what Commerce actually did. Commerce simply decided that the particular market conditions rendered price-to-price comparisons impracticable—nothing more. It certainly did not decide that the home market LNPPs, in general, could not be a foreign like product under the statute.

In light of what Commerce actually decided in its price-to-price comparison decision memorandum, it is apparent that its variable inter-

pretation of the reasonably comparable prong is not squarely before us, because Commerce did not apply that prong inconsistently in this determination. In the decision memorandum on price-to-price comparisons, Commerce did not discuss specifically its application of the reasonably comparable prong, but it used home market LNPPs as the foreign like product for the viability test, just as it did for the CV profit calculations. Therefore, these two applications were consistent with one another. This view is borne out by Commerce's own rejection of TKS's "inconsistent application" argument in *Japan Final*. Commerce stated its position as follows:

We disagree with TKS that there were no sales of the foreign like product in the home market during the [period of investigation.] TKS is incorrect to suppose that because we did not find home market sales which provided practicable price-to-price matches, no foreign like product existed. The foreign like product \* \* \* (i.e. sales of LNPP in Japan) did exist, as revealed by our examination of LNPP equipment sold in the home market for purposes of the Department's home market viability test \* \* \*. However, the degree of unique customization for customers made the difference-in-merchandise adjustment for product price matching potentially so complex that the use of CV provided a more reliable and administrable methodology for establishing NV.

*Japan Final*, 61 Fed. Reg. at 38,146. In other words, Commerce's own explanation in *Japan Final* reveals that it used the same foreign like product, Japanese LNPPs, both for CV profit and in its decision to use CV. Hence, no inconsistency has been presented to frame our review in this appeal.

Because Commerce did not apply its flexible statutory construction of the reasonable comparability prong in this determination, we decline to reach the issue of whether Commerce's interpretation is contrary to law. Furthermore, because Commerce did not apply inconsistent interpretations of the statute when determining TKS's antidumping duty, we reject TKS's statutory construction argument for reversal.

### III

For the reasons stated above, the decision of the Court of International Trade affirming Commerce's assessment of antidumping duties is affirmed in all respects.

#### COSTS

No costs.

**AFFIRMED**

INTERNATIONAL LIGHT METALS, PLAINTIFF-APPELLEE v.  
UNITED STATES, DEFENDANT-APPELLANT

## Appeal No. 00-1415

(Decided January 28, 2002)

*Joseph B. Tompkins, Jr.*, Sidley & Austin, of Washington, DC, argued for plaintiff-appellee. With him on the brief were *Frank R. Volpe*, and *Rebecca K. Smith*. Of counsel on the brief was *Donald F. Beach*, of Falls Church, Virginia.

*Mikki Graves Walser*, Attorney, International Trade Field Office, of New York, New York, argued for defendant-appellant. With her on the brief was *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, Department of Justice, of Washington, DC. Of counsel were *John J. Mahon*, Attorney, International Trade Field Office, Department of Justice, of New York, New York; and *Beth C. Brotman*, Attorney, U.S. Customs Service, Office of Assistant Chief Counsel, of New York, New York.

Appealed from: United States Court of International Trade  
Chief Judge GREGORY W. CARMAN

Before CLEVENGER, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*,  
and SCHALL, *Circuit Judge*.

FRIEDMAN, *Senior Circuit Judge*.

As used in this Customs case, "drawback" refers to the refund of Customs duties when a product "of the same kind and quality" as the imported product is subsequently exported. Here the United States Customs Service ("Customs") first awarded the appellee, International Light Metals ("International"), drawback, but then rescinded its ruling and required International to refund the drawback it had received, based on Customs' determination that the exported product was not "of the same kind and quality" as the imported product. In the prior appeal in this case, we reversed the Court of International Trade's affirmance of that ruling, on the ground that it was based upon a misinterpretation of the governing statute. We remanded the case to that court for further proceedings consistent with our opinion. On the remand, the Court of International Trade directed Customs to pay International the amount of drawback Customs had required International to refund.

The government's appeal challenges that ruling. The government contends that instead of directing Customs to pay a specified amount of drawback, the Court of International Trade should have merely remanded to Customs for the latter to determine the drawback issue anew under this court's interpretation of the statute in the first appeal. We reject the government's contention, and therefore affirm.

## I

A. Insofar as here pertinent, the drawback statute, 19 U.S.C. § 1313, provides:

## (a) Articles made from imported merchandise

Upon the exportation \* \* \* of articles manufactured or produced in the United States with the use of imported merchandise \* \* \* the



full amount of the duties paid upon the merchandise so used shall be refunded as drawback \*\*\*.

(b) Substitution for drawback purposes

If imported duty-paid merchandise and any other merchandise (whether imported or domestic) of the same kind and quality are used in the manufacture or production of articles within a [three-year] period \*\*\* there shall be allowed upon the exportation \*\*\* of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported or destroyed articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported \*\*\*.

In other words, drawback may be paid when a domestic product is substituted for the imported one, provided that the former is "of the same grade and quality" as the latter. The resulting authorization from Customs to obtain drawback often is called a "drawback contract."

To obtain drawback, a manufacturer must comply with Customs rules and regulations, one of which requires that "each manufacturer \*\*\* shall apply for a specific drawback contract by submitting a drawback proposal." 19 C.F.R. § 191.21(a) (1994).

B. The detailed facts of this case are set forth in this court's opinion in the prior appeal. See *Int'l Light Metals v. United States*, 194 F.3d 1355 (Fed. Cir. 1999). Only a brief summary is necessary here.

In 1985, International, which described itself as "a primary manufacturer of titanium products," submitted a drawback statement to Customs "to show that our manufacturing operations qualify for drawback" and to "request that the Customs Service authorize drawback on the basis of our statement." The drawback statement listed "Titanium Sponge, with a minimum titanium content of 99%" under both the "Imported Merchandise" and the "Domestic Merchandise of the Same Kind and Quality" categories. Customs approved this drawback statement, thereby creating a drawback contract authorizing International to claim drawback in accordance with the statement.

From 1985 to 1987, International filed twenty-four drawback claims, which Customs paid. After a 1988 audit of those claims under the drawback contract, in which Customs discovered that International had used titanium alloy scrap in addition to titanium sponge in its production process, the auditors concluded that International's substitution of titanium alloy scrap for the titanium sponge was improper under the drawback contract. They indicated, however, that the substitution "may be correctible by an amendment to the drawback contract."

International filed an amended drawback statement in which it added "Scrap made with the use of Titanium sponge containing at least 99.3% pure Titanium" to the category of "Domestic Merchandise of the Same Kind and Quality." Customs, however, rejected the proposed amended statement on the ground that titanium scrap was not "of the same grade and quality" as titanium sponge. It therefore allowed drawback only for the part of each claim attributable to titanium sponge and not to tita-



nium alloy scrap, and demanded repayment of the difference—\$477,639.73, together with interest, for a total of \$554,439.91.

International made the repayment and filed suit in the Court of International Trade seeking recovery of that sum. That court granted summary judgment for the government, upholding Customs' ruling that the titanium sponge and scrap were not of the "same kind and quality." *Int'l Light Metals v. United States*, 24 F. Supp. 2d 271, 292 (Ct. Int'l Trade 1998).

On appeal, this court reversed. *Int'l Light Metals v. United States*, 194 F.3d 1355 (Fed. Cir. 1999). The court stated:

It is undisputed that the titanium in the scrap was identical to the titanium in the sponge that ILM imported. Accordingly, the titanium in the domestic scrap was "of the same kind and quality" as the titanium in the imported sponge. Second, there is no dispute as to the amount of titanium that was in the scrap. As a result, the amount of a drawback to which ILM would be entitled based upon the titanium in that scrap and the titanium in the imported sponge could be precisely determined.

*Id.* at 1366.

The court

conclude[d] that ILM's proposal for a revised drawback contract was consistent with the requirements of 19 U.S.C. § 1313(b) because the titanium alloy scrap that ILM used in its manufacturing process contained titanium that was, in the words of the statute, "of the same kind and quality" as the titanium it imported. \* \* \* Under these circumstances, ILM was entitled to a revised contract that would have permitted drawback based upon the 16 entries (claims) that were not covered by its original contract.

*Id.* at 1367. The court found it unnecessary to reach another contention of International "because we have concluded that summary judgment was improperly granted in favor of the government based upon an erroneous view of the requirements of the statute." *Id.* at n.15.

The opinion concluded: "[t]he judgment in favor of the United States is reversed, and the case is remanded for further proceedings consistent with this opinion." *Id.* at 1367.

Following our reversal, the Court of International Trade ordered the matter to be:

remanded to the United States Customs Service for:

(1) approval of the revised drawback contract submitted by International Light Metals on June 19, 1989 as directed by the Federal Circuit; and

(2) payment of the drawback refund owed International Light metals in the amount of \$554,439.91, together with interest on that amount calculated from August 11, 1995 to the date of payment pursuant to 28 U.S.C. § 2644 (1994), as directed by the Federal Circuit.

## II

The government does not challenge the Court of International Trade's order that Customs approve International's revised drawback contract. It contends, however, that the court improperly directed Customs to pay International the \$554,439.91 of drawback Customs had required International to refund. According to the government, instead of deciding that issue itself, the Court of International Trade should have remanded for Customs to determine "how much, if any, drawback was due to" International.

The government invokes the settled principle of administrative law that "[w]hen an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and, after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.'" *NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. and Gen. Pipefitters, Local Union No. 638*, 429 U.S. 507, 522 n.9 (1977) (quoting *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901)). In determining whether and how that principle is to be applied, however, its purpose must always be kept in mind: it is designed to insure that the reviewing court does not intrude impermissibly on the authority of the administrative agency by itself taking action that implicates the agency's expertise and discretion. Whether the principle is to be applied necessarily turns upon the precise issues the reviewing court has decided and what questions remain for the agency to decide on remand.

Customs originally allowed and paid International drawback. The sole ground upon which it rescinded that decision and required International to refund the drawback was that titanium scrap was not a product "of the same grade and quality" as titanium sponge, so that International's use of the scrap in the exported product did not meet the statutory requirement for drawback covering substituted merchandise in 19 U.S.C. § 1313(b). As a result of that interpretation of the statute, Customs refused to approve International's revised drawback statement covering the use of titanium scrap in the exported product. That statutory interpretation also was the basis of the Court of International Trade's initial affirmation of Customs' decision.

The correctness of Customs' interpretation of § 1313(b) was the only issue before us in the prior appeal and the only issue we decided there. When we held that Customs had misinterpreted the statute, the result was to vitiate Customs' recapture of the drawback it had obtained pursuant to that statutory interpretation, and to recreate the situation as it had existed before the recapture. In other words, the situation was as if Customs had not rescinded its earlier approval of the drawback. The proper way to accomplish that result was to require Customs to repay to International the drawback it had allowed in the first instance, together with interest.

Such action by Customs did not require any exercise of the agency's discretion or expertise. It would be a simple ministerial act, and the Court of International Trade properly ordered Customs to make the repayment.

Nothing in our prior decision indicates, or even suggests, that we anticipated or intended that on remand Customs would reopen the matter to consider other possible flaws in International's drawback claims. We reject the government's contention that the Court of International Trade "committed reversible error when it ordered Customs to pay drawback to International without first affording Customs an opportunity to ascertain the facts necessary to determine how much, if any, drawback is attributable to International's substitution of scrap and sponge pursuant to the terms of the revised contract and applicable Customs regulations." The only issue litigated and decided in this case was the correctness of Customs' interpretation of the statute, upon which its denial of drawback rested. The Court of International Trade's direction that Customs repay to International the drawback it previously had required International to refund was a proper implementation of our decision rejecting Customs' interpretation of the statute.

#### CONCLUSION

The judgment of the Court of International Trade is

#### AFFIRMED.

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INTERNATIONAL TRADING CO., PLAINTIFF-APPELLEE v.  
UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 00-1577

(Decided March 1, 2002)

*R. Brian Burke*, Rode & Qualey, of New York, New York, argued for plaintiff-appellee. With him on the brief was *William J. Maloney*.

*James A. Curley*, Attorney, Civil Division, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellant. With him on the brief were *Stuart E. Schiffer*, Deputy Assistant Attorney General; *David M. Cohen*, Director, Department of Justice, of Washington, DC; and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Of counsel on the brief were *Edward N. Maurer*, Attorney, Office of Assistant Chief Counsel, United States Customs Service, of New York, New York; and *Cindy G. Buys*, Attorney, Office of Chief Counsel for Import Administration, Department of Commerce, of Washington, DC.

Appealed from: United States Court of International Trade  
Judge EVAN J. WALLACH

Before NEWMAN, RADER, and BRYSON, *Circuit Judges*.

BRYSON, *Circuit Judge*.

The government appeals from a decision of the United States Court of International Trade holding that the Customs Service did not liquidate

particular entries within the statutorily allotted time, and that those entries therefore were deemed liquidated at the rate deposited by the importer. The government challenges the court's decision as to when the period for Customs to liquidate the entries began to run. We reject the government's arguments and affirm the trial court's judgment.

# I

Between March 1993 and February 1994, the International Trading Company ("ITC") imported shop towels from a company in Bangladesh, Sonar Cotton Mills (Bangladesh) Ltd. At the time of entry into the United States, the towels were subject to an antidumping order that required a cash deposit of antidumping duties at the rate of 2.72%. In April 1994, the Department of Commerce published a notice in the Federal Register that it would conduct an administrative review of the antidumping duty order on shop towels from Bangladesh covering the period of March 1, 1993, to February 28, 1994. Liquidation of the entries falling within the scope of the review was suspended pursuant to 19 U.S.C. § 1673b(d).

On February 12, 1996, Commerce published the final results of the administrative review in the Federal Register. The final results announced an antidumping duty rate of 42.31% for Sonar's towels. The next day, Commerce sent an e-mail message to Customs. Referring to the Federal Register entry of the previous day, the message noted that the administrative review had been completed, but it advised Customs not to liquidate any entries covered by the review until it received liquidation instructions.

More than six months later, on August 29, 1996, Commerce sent another e-mail message to Customs. That message, which was designated "non-public," directed Customs to assess antidumping duties at the rate of 42.31% on imports of Sonar's towels and stated "these instructions constitute the immediate lifting of suspension of liquidation of entry summaries for the merchandise and period listed above."

Customs liquidated the entries in October of 1996 and assessed antidumping duties at the rate of 42.31% of the entered value. ITC filed a formal protest, arguing that the entries were deemed liquidated by operation of law under 19 U.S.C. § 1504(d) at the rate ITC asserted at the time of entry, *i.e.*, at the deposit rate of 2.72%, because Customs did not liquidate the entries within six months after receiving notice of the removal of suspension of liquidation. The protest was denied, and ITC's request for further administrative review was denied in a letter ruling by Customs.

ITC then filed this action in the Court of International Trade, contending that the entries should be deemed liquidated at the deposit rate. The court held that the statutory suspension of liquidation had been removed upon the publication of the final results of the administrative review in the Federal Register and that the e-mail message sent to Customs the following day provided notice to Customs that suspension had been lifted. Accordingly, the court concluded that Customs had

failed to liquidate the entries within six months after receiving notice of the removal of suspension, as required by 19 U.S.C. § 1504(d). Because Customs had failed to liquidate the entries within the allotted period, the court held that the entries were deemed liquidated at the deposit rate. The government then took this appeal.

## II

The statute that is the focus of this case, 19 U.S.C. § 1504(d) (Supp. V 1993), provides that when a suspension of liquidation required by statute or court order is removed,

the Customs Service shall liquidate the entry \* \* \* within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry \* \* \* not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

That statute has subsequently been amended, but not in ways material to the issue in this case.<sup>1</sup> Because section 1504 provides that an entry will be deemed liquidated by operation of law if Customs does not liquidate the entry within six months of receiving notice from Commerce that the suspension has been removed, it is critical to determine what constitutes the act that effects the removal of suspension and what constitutes notice of the removal to Customs. Unfortunately, neither section 1504 nor any other statute or regulation defines those statutory terms. Like the trial court, we therefore look to the structure and purposes of the Tariff Act to give those terms meaning.

## A

The trial court agreed with ITC that suspension of liquidation for the entries at issue in this case was removed when the final results of the administrative review were published in the Federal Register. The government disagrees and argues that the suspension of liquidation was not removed until after (1) the final results were published and (2) Commerce instructed Customs to liquidate the entries. We reject the government's argument and agree with the trial court that suspension was removed upon publication of the final results in the Federal Register.

The statutory scheme governing suspension of liquidation supports the trial court's conclusion that suspension of liquidation was removed when the final results of the administrative review were published in the Federal Register. Liquidation of a particular class of entries is suspended when Commerce publishes in the Federal Register an affirmative preliminary or final determination in an antidumping investigation covering those entries. *See* 19 U.S.C. §§ 1673b(d) (1988); 1673d(c)(1)(C) (1994). Liquidation is suspended in that setting because it is not possible, at that point, to determine what duties will be assessed against

<sup>1</sup> Other portions of the antidumping law have also been amended. In this opinion, we refer to the pre-1994 versions of each of the pertinent sections of the Tariff Act, which govern this case.

those entries. It follows logically that suspension should be removed as soon as it is possible to determine the appropriate duties, which occurs when the antidumping duty order is issued or the final results of an administrative review are announced. The statutes providing for the publication of an antidumping duty order or the final results of an administrative review are consistent with that understanding. In the case of antidumping duty orders, the applicable statute provides that the order should set forth the antidumping duty rate and directs Customs officers to assess antidumping duties promptly against the entries that are subject to the order. 19 U.S.C. § 1673e(a) (1994). In the case of the published final results of an administrative review, the applicable statute provides that the final results should set forth the determination of antidumping duty rates that "shall be the basis for the assessment of antidumping duties" on the subject entries. 19 U.S.C. § 1675(a)(2) (1988). A fair construction of those statutes is that because they impose an obligation on Customs to liquidate the entries promptly after publication of the order in question, the suspension of liquidation is removed as of the time of the publication. Moreover, as the trial court noted, tying the removal of suspension to the issuance of an antidumping duty order or the final results in an administrative review has the virtue of parallelism with the mechanism by which suspension was initiated; thus, suspension is begun by publication of an announcement of the beginning of the antidumping investigation, and suspension is removed by the publication of the announcement of the conclusion of the investigation.

The legislative history of section 1504(d) also supports the trial court's conclusion that suspension of liquidation was removed upon publication of the final results in the Federal Register. Before section 1504 was enacted, there was no statutory restriction on the length of time Customs could take to liquidate an entry. *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993). "Customs could delay liquidation as long as it pleased, with or without giving notice." *Int'l Cargo & Surety Ins. Co. v. United States*, 779 F. Supp. 174, 177 (Ct. Int'l Trade 1991). In 1978, Congress enacted section 1504 to impose a four-year time limit for liquidation. The primary purpose of section 1504 was to "increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction." *Dal-Tile Corp. v. United States*, 829 F. Supp. 394, 399 (Ct. Int'l Trade 1993) (internal quotations and citation omitted).

In 1993, Congress amended section 1504(d). The amendment was designed in part to address an anomaly in the prior version of the statute, which made deemed liquidation available if suspension of liquidation were removed before the expiration of the maximum four-year period for liquidating entries, but not if suspension of liquidation were removed after the expiration of the four-year period. See *Dal-Tile*, 829 F. Supp. at 399-400. The amendment increased the period of time within which Customs could liquidate entries after removal of suspension of



liquidation from 90 days to six months. In addition, however, the amendment made clear that deemed liquidation was the consequence of Customs' failure to liquidate within that six-month period. *See* H.R. Rep. No. 103-361 part I, at 139 (1993).

The government's position in this case would undermine one of the principal objectives of the 1993 amendments by giving the government the unilateral ability to extend the time for liquidating entries indefinitely. That is because under the government's theory the removal of suspension of liquidation would occur only when Commerce instructed Customs to liquidate the entries, an event that Commerce could postpone for any period of time after issuing the final results.

The government asserts that the publication of the final results of the administrative review in the Federal Register cannot be the act that removed the suspension of liquidation because Commerce had not necessarily finished its administrative review when those results were published. The trial court found no merit in that argument, nor do we. By regulation, Commerce was required, promptly after issuing the final results, to (1) "provide to parties to the proceeding which request disclosure a further explanation of the calculation methodology used in reaching the final results," 19 C.F.R. § 353.22(c)(9) (1993); and (2) "instruct the Customs Service to assess antidumping duties" on the merchandise entered during the period under review, 19 C.F.R. § 353.22(c)(10) (1993). If Commerce had not completed its administrative review at the time the final results were published in the Federal Register, it would not have been able to comply with its own regulations.

The government argues that because Customs acts in a ministerial capacity when liquidating antidumping duties, the suspension of liquidation cannot be removed until Customs has all the information it needs to perform its ministerial task, i.e., when Commerce gives Customs instructions regarding liquidation. While it is true that Customs merely follows Commerce's directions regarding the assessment of antidumping duties, that does not mean that the statutory removal of suspension of liquidation cannot occur until Customs gets liquidation instructions from Commerce. The statute contemplates that Commerce and Customs will cooperate to effectuate liquidation promptly after the publication of the final results of the administrative review. The statute thus quite reasonably imposes requirements of expedition on both Commerce and Customs. Contrary to the suggestion in the government's brief, there is nothing untoward about having the six-month period for liquidation run during the period between the time Commerce publishes the final results and the time Commerce directs Customs to liquidate the entries that are covered by those results.

The government makes the related argument that suspension of liquidation must continue beyond the date that the final results are published in order to allow time for aggrieved parties to request the correction of ministerial errors under 19 U.S.C. § 1675(h) and to seek judicial review under 19 U.S.C. § 1516a. That argument is a non sequitur.



Even under the government's proposed construction of section 1504(d), the time for correcting ministerial errors and seeking judicial review could be cut short if Commerce issued liquidation instructions at the time it published the final results and Customs promptly liquidated the subject entries based on those instructions. Thus, there is nothing about the government's proposed construction that would avoid the problem the government sees with the construction adopted by the trial court. By the same token, the trial court's construction does not force Commerce and Customs to act so quickly that importers will be deprived of their rights to seek correction of ministerial errors or judicial review of the final results. All that is required is that Commerce and Customs fulfill their respective obligations so that liquidation occurs within six months.

Finally, we take considerable comfort in the fact that our position is consistent with prior decisions of the Court of International Trade, the court that has expertise in addressing antidumping issues and deals on a daily basis with the practical aspects of trade practice. That court's decisions support the importer's position that suspension of liquidation was removed upon publication of the final results in the Federal Register. In *American Permac, Inc. v. United States*, 642 F. Supp. 1187 (Ct. Int'l Trade 1986), for example, the plaintiff claimed that entries should have been deemed liquidated four years after importation under 19 U.S.C. § 1504(d) (1982), even though liquidation was suspended at the time the four-year period ended. The court rejected that position, stating in the course of its analysis that "the statutorily required suspension of liquidation continued until [Commerce] published the final results of its review." 642 F. Supp. at 1197. The Court of International Trade has employed similar analysis in later cases. See *Am. Permac, Inc. v. United States*, 800 F. Supp. 952, 958 (Ct. Int'l Trade 1986), *aff'd*, 996 F.2d 1236 (Fed. Cir. May 12, 1993) (unpublished opinion); *Rheem Metalurgica S/A v. United States*, 951 F. Supp. 241, 248 (Ct. Int'l Trade 1996), *aff'd*, 160 F.3d 1357 (Fed. Cir. 1998).

The only contrary case cited by the government is *United States v. Jick (USA) Industries Corp.*, 27 F. Supp. 2d 199 (Ct. Int'l Trade 1998). In *Jick*, the court accepted the government's argument that the suspension of liquidation remained in effect until Commerce issued an unpublished e-mail instruction advising Customs that suspension had been lifted. 27 F. Supp. 2d at 201. The *Jick* court, however, observed that the importer had failed to cite any authority to support its argument on summary judgment that the suspension of liquidation was terminated upon publication of the final results in the Federal Register, and the court therefore drew an adverse inference on that issue against the importer. In this case, by contrast, the trial court noted that the importer had presented extensive and persuasive authority that suspension is removed upon publication of the final results, and for that reason declined to follow *Jick*. We agree with the trial court's analysis and hold that sus-

pension of liquidation in this case was removed upon publication of the final results of the administrative review in the Federal Register.<sup>2</sup>

### B

Even if suspension has been removed, section 1504(d) provides that the six-month period for deemed liquidation does not begin to run until Customs receives notice from Commerce that the suspension has been removed. The trial court found that publication of the final results in the Federal Register did not constitute notice to Customs that suspension had been removed but that the e-mail message sent to Customs the following day, February 13, 1996, did constitute such notice. On appeal, the government asserts that the February 13 e-mail message did not constitute notice within the meaning of section 1504(d) and that Customs did not receive such notice until it received specific instructions from Commerce to liquidate the entries, an event that according to the government did not occur until the non-public e-mail message of August 29, 1996. ITC, on the other hand, argues that publication by Commerce of the final results in the Federal Register constituted notice to Customs of the removal of suspension. Although the judgment in this case would be the same under either the trial court's construction of the statute or ITC's construction, we agree with ITC that publication of the final results in the Federal Register constitutes notice to Customs within the meaning of section 1504(d).

For some of the same reasons that publication of the final results removes the suspension of liquidation, publication also provides notice of the removal to Customs. Publication in the Federal Register is a familiar manner of providing notice to parties in antidumping proceedings. *See, e.g.*, 19 U.S.C. § 1673d(d) (1994) (requiring the International Trade Commission and Commerce to notify interested parties of their determinations by publication in the Federal Register); 19 U.S.C. § 1673e(c)(2)(A) (1994) (requiring Commerce to publish notice in the Federal Register if it decides to allow an importer to post a bond in lieu of the deposit of estimated antidumping duties); 19 U.S.C. § 1673e(c)(3) (1988) (requiring Commerce to publish notice in the Federal Register of the results of its determinations and to assess antidumping duties based on those published results); 19 U.S.C. § 1516a(a) (1994) (requiring parties who object to a Commission decision to act within 30 days after the date of publication of that decision in the Federal Register); 19 U.S.C. § 1516a(c)(1) (1994) (tying the date for liquidation of entries affected by a relevant court decision to the date that notice of that court decision is published in the Federal Register). It therefore seems reasonable that

<sup>2</sup>The government urges us not to follow the lead of the Court of International Trade but to defer to a series of Customs Service rulings, including the ruling in this case, in which Customs has stated its view that the six-month period of section 1504(d) is not triggered until Customs receives liquidation instructions from Commerce. As the Supreme Court recently explained in a closely analogous context, such rulings are not entitled to deference under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); instead, they are entitled to weight only to the extent that they are carefully considered, consistent, and persuasive. *Mead Corp. v. United States*, 121 S. Ct. 2164, 2171 (2001). The Customs rulings on which the government relies contain little legal analysis, and although they take a consistent legal position, we do not find that legal position persuasive. We therefore decline the government's invitation to defer to the position taken in Customs' rulings in this and other similar cases.

Congress intended for publication of the final results in the Federal Register to have some legal effect.

Moreover, the date of publication provides an unambiguous and public starting point for the six-month liquidation period, and it does not give the government the ability to postpone indefinitely the removal of suspension of liquidation (and thus the date by which liquidation must be completed) as would be the case if the six-month liquidation period did not begin to run until Commerce sent a message to Customs advising of the removal of suspension of liquidation. Beyond that, treating the date of notification as separate from the date of publication could lead to messy factual disputes about when Customs actually received notice of the removal of the suspension of liquidation. As in this case, the courts would be required to referee debates about what kind of communication from Commerce relating to the announcement of the final results constituted a qualifying "notice" of the removal of suspension. The government, for example, contends that "notice" of the removal of suspension requires that Commerce provide Customs with liquidation instructions before Customs can be deemed to have "notice" of the removal of suspension, even though the statute says nothing about liquidation instructions. Adopting that position would require the courts, after the fact, to examine informal and non-public communications between Commerce and Customs to determine whether and when those communications constituted "liquidation instructions."

The language of 19 U.S.C. §§ 1675(a)(1) and 1675(a)(2) also supports the construction that publication of the final results in the Federal Register constitutes notice to Customs of the removal of suspension of liquidation for the entries covered by that administrative review. Section 1675(a)(1) mandates publication of the final results and requires that Commerce include in those results "notice of any duty to be assessed." It is fair to conclude that "notice" of the duty to be assessed is notice both to the importer, which will have to pay the duty, and to Customs, which will have to impose it. If publication of the final results constitutes removal of the suspension of liquidation, as we have held, then "notice" of the duty to be paid is, in effect, notice of the removal of suspension. Section 1675(a)(2) buttresses that point by specifying that the notice published in the Federal Register "shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination \* \* \*." Because Congress required Customs to base the amounts of the antidumping duty assessments on the contents of the final results as published in the Federal Register, it is fair to conclude that the publication of those final results constitutes notice to Customs of the removal of suspension and Customs' obligation to proceed to liquidate the entries on the terms set forth in the final results.

It is true, as the trial court pointed out, that the Tariff Act sometimes uses the term "notice" or "notify" and at other times specifies publication in the Federal Register. The trial court found that those different uses convey two different concepts and that if Congress had intended for

Customs to receive notice of the removal of suspension of liquidation simply by virtue of the publication of the final results in the Federal Register, it would have been unnecessary to include a notice requirement in section 1504(d).

While there is force to that point, we think it is a sufficient answer that section 1504(d) applies not only to the removal of suspension that occurs upon publication of the final results of an administrative review, but also to the removal of suspension in other contexts, including the removal of a court-ordered suspension of liquidation. In that setting, the removal of suspension occurs as the result of court action, not a Federal Register publication, and the required notice must be provided by a separate mechanism. For that reason, it makes sense for section 1504(d) to refer separately to the acts of removal of suspension of liquidation and notification of the removal. In the case of issuance of the final results of an administrative review, unlike the removal of a court-ordered suspension, the removal of suspension of liquidation is effected by Federal Register publication, an act that provides general notification to affected parties regarding the reported action. In that setting, there is no reason to interpret section 1504(d) to require that notice of the removal of suspension of liquidation be provided by a mechanism separate from the act that effects the removal of suspension.

Accordingly, we hold that suspension of liquidation was removed on February 12, 1996, when the final results of the administrative review were published in the Federal Register. We also hold that publication of the final results in the Federal Register constituted notice from Commerce to Customs that the suspension of liquidation on the subject entries had been removed. Customs did not liquidate the entries within six months of February 12, 1996, as required by section 1504(d). The entries were therefore properly treated as having been liquidated six months after February 12, 1996, at the 2.72% antidumping duty asserted at the time of entry by ITC.

**AFFIRMED.**

ROLLERBLADE, INC., PLAINTIFF-APPELLANT *v.*  
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01-1049

(Decided March 5, 2002)

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*Amy M. Rubin*, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, International Trade Field Office, of New York, New York, argued for defendant-appellee. With her on the brief were *Stuart E. Schiffer*, Deputy Assistant Attorney General, and *David M. Cohen*, Director. Of counsel on the brief was *Sheryl A. French*, Office of Assistant Chief Counsel, United States Customs Service, of New York, New York.

Appealed from: United States Court of International Trade  
Judge DONALD C. POGUE

Before NEWMAN, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and  
RADER, *Circuit Judge*.

RADER, *Circuit Judge*.

Rollerblade, Inc. (Rollerblade) appeals from a summary judgment of the United States Court of International Trade affirming the United States Customs Service (Customs) classification of imported in-line roller skating protective gear under subheading 9506.99.6080 (99.6080) of the Harmonized Tariff Schedules of the United States (HTSUS)\* *Rollerblade, Inc. v. United States*, 116 F. Supp. 2d 1247 (Ct. Int'l Trade 2000). Because Customs correctly classified the imports, this court affirms.

I.

The imports in this case are in-line roller skating protective gear, such as knee pads, elbow pads, and wrist guards. Customs classified the imported protective gear as residual "other" sports equipment under subheading 99.6080 of the HTSUS, which carries a duty rate of 4% *ad valorem*:

9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:					
*	*	*	*	*	*	*
9506.99	Other					
*	*	*	*	*	*	*
9506.99.60	Other					
*	*	*	*	*	*	*
9506.99.6080	Other					

\* References to the HTSUS throughout this opinion are to the 11th Edition published in 1999. See The Harmonized Tariff Schedules of the United States (1999), U.S. Customs Serv., available at <http://www.customs.gov/download/htsusa/htsusa.pdf>.

Rollerblade appealed to the Court of International Trade, arguing that Customs should have classified the protective gear as "accessories" under subheading 9506.70.2090 ("70.2090"). HTSUS subheading 70.2090 carries a 0% duty rate:

9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:
*	*
9506.70	Ice skates and roller skates, including skating boots with skates attached; parts and accessories thereof:
9506.70.20	Roller skates and parts and accessories thereof
*	*
9506.70.2090	Other

Rollerblade sought this "accessory" classification because the protective gear was designed, tested, manufactured and marketed solely for use with in-line roller skates. Because the protective gear bore no direct relationship to roller skates, the Government argued that the imports were not accessories to that defining article.

The Court of International Trade affirmed the Customs classification based primarily on its interpretation of the dictionary meaning of the term "accessory." *Rollerblade*, 116 F. Supp. 2d at 1253. According to the trial court, an accessory under subheading 70.2090 must be "of" or "to" the article (roller skates) listed in the heading, not "of" or "to" the activity (roller skating) for which the article is used. *Id.* The trial court found that the protective gear had a direct relationship to the activity of roller skating, but not to the HTSUS heading, namely roller skates. Hence, the trial court affirmed Custom's refusal to classify Rollerblade's protective gear under subheading 70.2090 as an "accessory" to roller skates. *Id.* at 1254-55. Moreover, on summary judgment, the Court of International Trade concluded that Customs properly classified the protective gear under the residual "other" [sports equipment] subheading 99.6080. *Id.* at 1257.

Rollerblade timely appealed to this court, which has exclusive appellate jurisdiction. 28 U.S.C. § 1295(a)(5) (1994). Rollerblade argues that the protective gear constitutes "parts" to the roller skates because it contributes to the safe and effective operation of the in-line roller skates.

## II.

This court reviews summary judgment "for correctness as a matter of law, deciding *de novo* the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist." *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539, 1543 (Fed. Cir. 1994) (quoting *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d



763, 767 (Fed. Cir. 1993)). In the context of this case, however, this court defers to the contested Customs classification. Although not entitled to *Chevron* deference (see *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)), a Customs classification receives some deference in accordance with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *United States v. Mead Corp.*, 533 U.S. 218 (2001). Furthermore, under 28 U.S.C. § 2639(a)(1), "a classification of merchandise by Customs is presumed to be correct." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). Thus, "the burden of proof is upon the party challenging the classification." *Mita Copystar Am.*, 21 F.3d at 1082 (citing *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed. Cir. 1984)).

Classification of goods under the HTSUS entails both ascertaining the proper meaning of specific terms in the tariff provision and determining whether the merchandise subject to tariffs comes within the description of those HTSUS terms. *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). The meaning accorded HTSUS terms presents a question of law, which this court reviews without deference. *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001). When reviewing whether the imports fit within those terms, this court uses a clear error standard. *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997).

When the HTSUS does not define a tariff term, the term receives its "common and popular meaning." *E.M. Chems. v. United States*, 920 F.2d 910, 913 (Fed. Cir. 1990). This court presumes the common meaning of a term used in commerce to be the same as its commercial meaning. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To determine a term's common meaning, a court may consult "dictionaries, scientific authorities, and other reliable information sources." *C.J. Tower & Sons v. United States*, 673 F.2d 1268, 1271 (CCPA 1982).

The General Rules of Interpretation (GRI) of the HTSUS govern the classification of goods within HTSUS. The GRI bases proper classification under HTSUS on the heading or subheading terms. GRI 1 provides: "[f]or legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." Similarly, GRI 6 states: "[C]lassification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related notes and, *mutatis mutandis*, to the above rules."

In this case, subheading 70.2090 recites "[r]oller skates and parts and accessories thereof" (emphasis added), and not "roller skating and accessories thereof." In other words, subheading 70.2090 refers to an article (roller skates), not to an activity (roller skating). The subheading also covers parts of that article, such as wheels or laces for the skates. Thus, the subheading language specifically addresses roller skates and their parts and accessories. The language does not embrace every accessory associated with the broader activity of roller skating.

Like the trial court, this court also observes that HTSUS offers no definition for the term "accessory." Thus, the trial court correctly con-



sulted the common (dictionary) meaning of the term. See *E.M. Chems.*, 920 F.2d at 913. As the Court of International Trade found, dictionary definitions indicate that an "accessory" must bear a direct relationship to the primary article that it accessorizes. In this case, under subheading 70.2090, the article accessorized is roller skates, not the general activity of roller skating. Moreover, as found by the trial court, the protective gear lacks a direct relationship to the roller skates. The protective gear does not directly act on the roller skates at all. Unlike a roller skate part or accessory, the protective gear does not directly affect the skates' operation. Thus, based on the common meaning of "accessory" and the language of subheading 70.2090, this court sustains the trial court's conclusion that Rollerblade's imported protective gear is not a roller skate accessory.

Before the Court of International Trade, Rollerblade contended solely that their protective gear was an accessory to roller skates. Rollerblade now argues for the first time that the protective gear is, alternatively, "parts" of the roller skates. Rollerblade would classify the protective gear as roller skate parts because it contributes to the safe and effective operation of the skates and functions by design solely with the skates. Because the terms "parts" and "accessories" appear in the same phrase under subheading 70.2090, this court, in its discretion, entertains this new argument. See *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Nat'l Ass'n of Mfrs. v. Dep't of Labor*, 159 F.3d 597, 605-06 (D.C. Cir. 1998).

A "part" is "an essential element or constituent; integral portion which can be separated, replaced, etc." *Webster's New World Dictionary* 984 (3d College Ed. 1988). Thus, based on the common meaning, the term "part," like the term "accessory," must have a direct relationship to the primary article, rather than to the general activity in which the primary article is used. Again, the protective gear in this case has a relationship to the activity of roller skating, and not directly to the roller skates.

In *Trans Atlantic Co. v. United States*, this court's predecessor held that brackets mounted on the door frame were parts of a door closer because they were necessary to the efficient operation of the door closer. 48 C.C.P.A. 30 (1960). Likewise, in *Gallagher & Ascher Co. v. United States*, our predecessor court noted the purpose of an auxiliary heater in an air cooled automobile: "[T]he auxiliary heater contributed to the safe and efficient operation of the Volkswagen in frigid temperatures in relation to comfort of its occupants and in aid of the indispensable safety factor of vision by assisting in the removal of ice from the windshield." 52 C.C.P.A. 11, 16 (1964). The *Gallagher* court then held: "When once attached to the automobile to which it was solely dedicated and in the manner disclosed, and in the performance of the function for which it was designed, [the auxiliary heater] became a part of the automobile within the purview of paragraph 369(c) of the Tariff Act of 1930, as modified." *Id.*

Unlike *Trans Atlantic* and *Gallagher*, however, Rollerblade's imported protective gear protects the wearer from injuries related to an ac-

tivity using the article. The imports do not attach to or contact in any way the subheading article, namely roller skates. The imports are not necessary to make the skates themselves work (as were the door brackets), nor are they necessary to make the skates themselves work efficiently or safely (as was the auxiliary heater). At best, the protective gear adds to the comfort and convenience of the wearer while roller skating. Rollerblade attempts to analogize the protective gear to the auxiliary heater in *Gallagher*, which the court found to provide comfort for the automobile passengers. While the auxiliary heater did provide comfort for the passengers, the *Gallagher* court did not rely on that feature to determine the heater's relationship to the automobile. Rather, the court held that the auxiliary heater became a "part" when attached to the automobile to make the automobile itself safer by removing ice from the windshield. *Id.* Thus, *Trans Atlantic* and *Gallagher* do not apply to this case.

This court recently construed the term "parts" in another Customs classification case. In *Bauerhin Technologies, Ltd. Partnership v. United States*, this court affirmed the Court of International Trade's classification of imported cushioned inserts and canopies for child safety seats. 110 F.3d 774 (Fed. Cir. 1997). Although specially designed to fit the child safety seat, the imported insert facilitated an activity (napping) associated with the HTSUS article. For this reason, the import was not a part of the child safety seat. This court thus affirmed Customs' classification of the article as "bedding and similar furnishings." *Id.* at 778. With respect to the canopy, the court determined that it attached to the seat and was sold as a child safety seat "part." In other words, the canopy was marketed as an "attachment" to the child safety seat without any use or purpose independent of that child safety seat. *Id.* Accordingly, this court upheld the Court of International Trade's judgment that required classification of the canopies as "parts." *Id.* at 779.

In this case, however, the protective gear has more in common with the child safety seat inserts. Because in contact with the seat, the cushioned inserts might have had a better case for classification as a "part" than the protective gear in this case. The protective gear is not analogous to the canopy over the child safety seat at all. Unlike the canopy, these imports sell separately from the roller skates. Moreover, the protective gear does not contact the skates at all and does not act directly on the skates. In other words, the roller skates work in the same manner whether the skater wears the protective gear or not. Concurrent use of the protective gear with the roller skates no doubt reduces injuries to the skater from the activity of roller skating, but this observation does not make the protective gear "parts" of the roller skates.

After properly excluding subheading 70.2090 as an acceptable classification, Customs chose classification under subheading 99.6080, entitled "other" [sports equipment]. Without a specific provision for this merchandise, Customs correctly classified the merchandise under the most applicable residual basket subheading. See *EM Indus. v. United*

*States*, 999 F. Supp. 1473, 1480 n.9 (Ct. Int'l Trade 1998) ("Basket' or residual provisions of HTSUS Headings \* \* \* are intended as a broad catch-all to encompass the classification of articles for which there is not a more specifically applicable subheading."). In this case, the most applicable heading is 9506, entitled "[a]rticles and equipment for general physical exercise \* \* \* gymnastics, athletics, other sports." Subheading 99.6080, entitled "[o]ther," is the so-called catch-all for this provision. The definition offered for "equipment" includes those articles that are necessary and specifically designed for use in athletics and other sports. Rollerblade's imported protective gear fits within this category because it is "equipment" specifically designed for use in the sport of roller skating.

In sum, the Court of International Trade did not err in its determination that Customs properly classified Rollerblade's imported protective gear under the residual subheading 99.6080.

COSTS

Each party shall bear its own costs.

**AFFIRMED.**

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MEAD CORP., PLAINTIFF-APPELLANT *v.*  
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 98-1569

(Decided March 8, 2002)

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On remand from: The Supreme Court of the United States

Before NEWMAN, RADER, and SCHALL, *Circuit Judges*.

RADER, *Circuit Judge*.

This case is before this court on remand from the Supreme Court of the United States. *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164 (2001) (*Mead III*). In *Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999) (*Mead II*), this court reversed the Court of International Trade's affirmation of a tariff classification from the U.S. Customs Service (Customs). Customs had classified day planners imported by Mead Corporation (Mead) as bound diaries. In reversing the trial court, this court accorded no deference to the Customs classification. The Supreme Court vacated the judgment of this court in *Mead II* and remanded because this court did not accord deference to the classification under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944).

In reconsidering the merits, this court applies *Skidmore* deference to the classification ruling at issue. Because Customs' classification of Mead's day planners within subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States (HTSUS) does not persuade under the *Skidmore* standard, this court reverses.

#### I.

At issue are five models of Mead's day planners (model nos. 47192, 47062, 47124, 47104, and 47102). The day planners differ from each other only stylistically based on size (ranging from 7-1/2" x 4-3/8" to 12" x 10-5/8"), outer jacket cover material, and type of closure. The basic model contains a calendar, a section for daily notes, a section for telephone numbers and addresses, and a notepad. The larger models contain the features of the basic model with additional items such as a daily planner section, plastic ruler, plastic pouch, credit card holder, and computer diskette holder. A loose-leaf ringed binder holds the contents of the day planner, except for the notepad, which fits into the rear flap of the day planner's outer cover.

In a January 11, 1993 ruling, Customs classified the subject planners as bound diaries under subheading 4820.10.20 (emphasis added):

- 4820 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, *diaries and similar articles*, exercise books, blotting pads, binders (looseleaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for sample or for collections and book covers (including cover boards and book jackets) of paper or paperboard:
- 4820.10 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, *diaries and similar articles*:
- 4820.10.20 *Diaries*, notebooks and address books, *bound*; memorandum pads, letter pads and similar articles

Customs' original 1993 ruling offered little explanation for classifying Mead's day planners as bound diaries. After Mead protested, Customs issued a new ruling on October 21, 1994, with more detailed reasoning

about the classification under subheading 4820.10.20. This 1994 ruling is at issue in this case.

Moving for summary judgment in the trial court, Mead asserted both that its imports were not diaries and were not bound. Either contention, if accepted, compels classification under the "other" provision of subheading 4820.10.40. Under that subheading, Mead would owe no tariff on the imported articles, in contrast with the 4.0% tariff assessed in Customs' 1993 ruling. In support of its motion, Mead submitted dictionary definitions of the terms at issue, affidavits from seven individuals from the U.S. stationery goods industry, and affidavits from two bookbinding experts. The Government cross-moved for summary judgment in support of Customs' classification, offering its own definitions of "diary" and "bound," and submitting supporting affidavits.

In a July 14, 1998 opinion (No. 98-101), the trial court granted the Government's motion. The Court of International Trade broadly defined "diaries" as "articles whose principle purpose is to allow a person to make daily notations concerning events of importance." Under that definition, the trial court decided that Mead's day planners qualify as diaries even though they admittedly contain "supplementary material"—non-diary elements such as a section for addresses and telephone numbers. With respect to the term "bound," the trial court opined: "The common meaning of 'bound' is fastened. The irrevocability of the fastening is not important so long as it goes beyond the transitory role of packaging." The trial court thus found that Mead's day planners, whose contents fit in a loose-leaf ringed binder, fall within that broad definition of "bound."

Mead argued for a different definition of "diaries": "A book for recording a person's observations, thoughts and/or events." Mead further contended that "bound" applies only when pages are "permanently secured along one edge between covers in a manner traditionally performed by a bookbinder." Reversing the Court of International Trade, this court held that Mead's day planners were neither "diaries" nor "bound." *Mead II*, 185 F.3d at 1311. Thus, this court concluded that the day planners required classification under the "other" provision of subheading 4820.10.40. In reaching its conclusion, this court did not accord ordinary classification rulings the deference described in *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778 (1984).

The United States then petitioned for a writ of certiorari to the United States Supreme Court. The Supreme Court granted certiorari, 530 U.S. 1202 (2000), to determine "the limits of *Chevron* deference owed to administrative practice in applying a statute." *Mead III*, 533 U.S. at \_\_\_, 121 S. Ct. at 2171. The Court held that classification rulings, although "beyond the *Chevron* pale," may merit some deference under *Skidmore*. *Id.* at \_\_\_, 121 S. Ct. at 2167. The Court vacated and remanded the earlier judgment of this court with instructions to consider Customs' classi-

fication ruling under the principles in *Skidmore*. *Id.* at \_\_\_, 121 S. Ct. at 2177.

## II.

This court reviews the Court of International Trade's grant of summary judgment without deference. *Sharp Microelectronics Tech., Inc. v. United States*, 122 F.3d 1446, 1449 (Fed. Cir. 1997). Where, as here, the parties do not dispute material facts regarding the imported goods, this court's review of the classification of the goods collapses into a determination of the proper meaning and scope of the HTSUS terms, which, as a matter of statutory interpretation, is a question of law. *See SGI, Inc. v. United States*, 122 F.3d 1468, 1471 (Fed. Cir. 1997).

In keeping with the Supreme Court's instructions in *Mead III*, this court affords a classification ruling deference in accordance with the principles set forth in *Skidmore*. *Mead III*, 533 U.S. at \_\_\_, 121 S. Ct. at 2167. Under *Skidmore*, a classification ruling receives a measure of deference proportional to its "power to persuade." *Id.*; *Skidmore*, 323 U.S. at 140. That power to persuade depends on the thoroughness evident in the classification ruling, the validity of its reasoning, its consistency with earlier and later pronouncements, the formality attendant the particular ruling,<sup>1</sup> and all those factors that give it power to persuade. *Mead III*, 533 U.S. at \_\_\_, 121 S. Ct. at 2167; *Skidmore*, 323 U.S. at 140. In addition, Customs' relative expertise in administering the tariff statute often lends further persuasiveness to a classification ruling, entitling the ruling to a greater measure of deference. While this court therefore recognizes its responsibility to accord a classification ruling the degree of deference commensurate with its power to persuade, this court also recognizes its independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms. *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001).

## III.

This court construes a tariff term according to its common and commercial meanings, which it presumes are the same. *See Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To discern the common meaning of a tariff term, this court consults dictionaries, scientific authorities, and other reliable information sources. *See C. J. Tower & Sons of Buffalo, Inc. v. United States*, 673 F.2d 1268, 1271 (Fed. Cir. 1982).

### A. DIARIES

Customs gleaned its broad meaning of diaries from three prior cases. In *Baumgarten v. United States*, 49 Cust. Ct. 275, Abstract No. 67150 (1962), the court considered a plastic-covered book, 4-1/4" by 7-3/8", having pages for addresses and telephone numbers followed by ruled pages allocated to the days of the year and the hours of the day. Calen-

<sup>1</sup> Certain rulings—specifically, those that have the "effect of changing a practice"—undergo notice-and-comment procedures. 19 C.F.R. § 177.10(c) (2001). This case does not involve such a ruling.



dars for the current and following months headed the ruled pages. The importer invoiced the articles as "desk-diaries." In classifying them as diaries rather than as "other blank books and slate books," the court looked first to the definition of a diary in *Webster's New International Dictionary of the English Language* (2d ed. 1951): "A register of daily events or transactions; a daily record; journal; esp., a book for personal notes or memoranda, or for details of experiences or observations of the writer; also, a blank book for daily memoranda." *Baumgarten*, 49 Cust. Ct. at 276. Based on this definition, the court decided:

[T]he particular distinguishing feature of a diary is its suitability for the receipt of daily notations \* \* \*. By virtue of the allocation of spaces for hourly entries during the course of each day of the year, the books are designed for that very purpose. That the daily events to be chronicled may also include scheduled appointments would not detract from their general character as appropriate volumes for the recording of daily memoranda.

*Id.*

In *Brooks Brothers v. United States*, 68 Cust. Ct. 91 (1972), the court considered an "Economist Diary," a 10" by 8" spiral bound article, covered in red leather, with fine plate-finish parchment. The importer did not dispute that the Diary featured pages suitable for use as a diary, but argued that the Diary also contained printed informational material such as maps and thus could not be classified as "Blank books, bound: Diaries." Discussing *Baumgarten*, the trial court noted: "Judicial authority, therefore, has adopted the crux of the lexicographic definitions that the 'particular distinguishing feature of a diary is its suitability for the receipt of daily notations.'" *Id.* at 97. The court concluded that although the informational pages added to the usefulness or value of the article, the diary portion of the Economist Diary, "clearly 'suitable for the receipt of daily notations,'" controlled the classification. *Id.* at 97-98.

Finally, in *Charles Scribner's Sons v. United States*, 6 CIT 168 (1983), the court classified an "Engagement Calendar," a 9-3/8" by 6-1/2" spiral bound article with photographs on the left side and a table of the days of the week on the right, as a calendar rather than a diary. It acknowledged the *Baumgarten* and *Brooks Brothers* cases, but decided that, in contrast to a diary that is "primarily intended to be used in connection with extensive notations," the article at issue was intended only "for a notation of no more than a sentence or two." *Id.* at 175.

Both Customs and the trial court relied heavily on these cases for their definition of diaries. These cases, however, involved classification of goods under tariff provisions different from the HTSUS at issue in this case. These prior cases therefore supply only limited guidance for this case. In *Charles Scribner's Sons*, for instance, the court decided between classifying the articles as calendars or diaries. Neither party in this case would classify the day planners as calendars. In *Baumgarten*, the court classified the articles at issue under the Tariff Act of 1930,



which provided sparse guidance under Schedule 14 ("Papers and Books");

Blank books and slate books:

Address books, diaries, and notebooks

Other

Likewise, the court in *Brooks Brothers* decided its case with similarly sparse guidance under the old Tariff Schedule of the United States (TSUS):

Schedule 2. Wood and Paper; Printed Matter

Part 4. Paper, Paperboard, and Products Thereof

Subpart C. Paper and Paperboard Cut to Size or Shape;  
Articles of Paper and Paperboard

Blank books, bound:

256.56 Diaries, notebooks, and address books

256.58 Other

These earlier tariff schedules do not contain the specificity of the corresponding HTSUS headings. The more precise HTSUS classification scheme, which distinguishes diaries from articles similar to diaries, necessitates a more precise definition of the terms at issue. Stated another way, while the blunt dividing line in *Baumgarten* and *Brooks Brothers* distinguished diaries from other blank books, this court must distinguish diaries from account books, notebooks, receipt books, and other articles similar to diaries. Thus, this court must define and differentiate diaries with a finer point than those earlier cases.

The *Oxford English Dictionary*, at 612 (1989), defines a diary as: "1. A daily record of events or transactions, a journal; specifically, a daily record of matters affecting the writer personally, or which come under his personal observation." This definition largely comports with the definition cited in *Baumgarten* and with other dictionary definitions. The *American Heritage Dictionary of the English Language*, at 516 (3d ed. 1992), for example, defines a diary as: "1. A daily record, especially a personal record of events, experiences, and observations, a journal." See also *Webster's New Twentieth Century Dictionary of the English Language* at 504 (2d ed. 1961) ("1. a daily written record, especially of the writer's own experiences, thoughts, etc.").

These definitions reflect two key aspects of a diary. A diary provides space for a record, especially, as the Court of International Trade recognized, "concerning events of importance." Thus, a diary facilitates recording more than the mere date or time of events, but also more detailed observations, thoughts, or feelings about those events. This court, however, would not expand a diary record to embrace a broad range of writings embraced by the term "notations." To the contrary, the term "notations" encompasses the use of only a word or a brief phrase—writings too brief to include details about events, observations, thoughts, or feelings. To constitute a diary record at all, then, notations must be relatively extensive. In the words of *Charles Scribner's Sons*, a diary must have space for "more than a sentence or two." 6 CIT at 175.

In addition, a diary is a "record" in the sense that it "recalls or relates past events." *Webster's Ninth New Collegiate Dictionary* at 984 (1990) (emphasis added). A diarist records events, observations, feelings, or thoughts after they happen. A diary is retrospective, not prospective. A diary is not a place to jot down the date and time of a distant dentist appointment, regardless of whether that appointment would constitute an "event of importance."

Applying these aspects of the definition of a diary, the imports are articles similar to diaries (encompassed by "other" in subheading 4820.10.40), rather than diaries themselves under subheading 4820.10.20. With regard to the question of sufficient space to record detailed observations, this court notes that the Government's brief does not identify which part of the imports constitutes the diary portion. The record suggests that the trial court below focused on the "daily planner" section, which all five imported models have in common.<sup>2</sup> The daily planner section includes a series of pages allocated to days and numbered with the hours of the day along the left hand side of the page. Two blank lines (four shorter lines in the largest model) extend to the right of each hour. The very limited space provided by these blank lines would not permit a diarist to record detailed notations about events, observations, feelings, or thoughts. This limited space permits only the briefest notations. Space for only a word or phrase disqualifies these articles as diaries.

Moreover, an examination of the articles shows that the few lines for recording events does not envision recording of past events. The caption "Daily Planner" appears at the top of each page. The word "Appointments" appears above the blank lines. These pages facilitate advance planning and scheduling. As noted above, however, a diary is not a planning tool. Instead, a diary receives a retrospective record of events, observations, thoughts, or feelings. Mead markets its entire article as a "Day Planner," further buttressing the distinction between this prospective scheduling article and a diary. While the importer's marketing of the goods will not dictate the classification, such evidence is relevant to the determination and, in this case, weighs against classifying the articles as diaries. Indeed, the earlier trade cases—*Baumgarten* (desk-diaries); *Brooks Brothers* (Economist Diary); *Charles Scribner's Sons* (Engagement Calendar)—turned at least in part on the fact that the importers themselves regarded their articles either as diaries or as calendars. See, e.g., *Brooks Brothers*, 68 Cust. Ct. at 98 ("[T]he Economist Diary is \* \* \* by its own description a 'diary.'").

Thus, although mindful of Customs' relative expertise in classifying imported articles and its consistency in classifying day planners and other similar articles as bound diaries since 1993, this court concludes that Mead's imported day planners are not "diaries" (nor any form of a diary) within the meaning of subheading 4820.10.20. This conclusion

<sup>2</sup>To the extent the Government relies on any other portion of the day planners not discussed herein, this court has considered all sections and has determined that none qualify the article as a diary.

alone compels the classification of the subject articles under the "other" provision of subheading 4820.10.40.

#### B. BOUND

Reasoning that the tariff provisions at issue cover a "wide variety of book and non-book articles," the trial court eschewed the meaning of "bound" as used in the trade of book manufacturing. While heading 4820 covers book and non-book articles, the term "bound" does not appear in that heading. Rather, the term appears for the first time in subheading 4820.10.20 where it modifies "Diaries, notebooks and address books." These three items, the parties agree, are all books. Thus, the proper context to ascertain the meaning of "bound" is in the context of the manufacture of books. The trial court interpreted the term "bound" more broadly because it applied the term to non-book articles as well. In proper context, however, the HTSUS subheading uses "bound" in connection with types of books. Therefore, anchored to this correct context, this court seeks the meaning of that term.

*The Dictionary of Publishing*, at 43-44 (1982), defines the term "bound book" as: "Books that have been cased in, usually referring to books that have been sewn, glued, or stapled into permanent bindings." *Webster's Ninth New Collegiate Dictionary* defines "bound" as "4. of a book: secured to the covers by cords, tapes, or glue." These definitions within the proper context describe binding methods and materials as permanent. Thus, this court concludes that the term "bound," when used with reference to books as in subheading 4820.10.20, means permanently secured or fastened. In addition, affidavits from bookbinding and stationery goods experts in the record confirmed this meaning of the term "bound" in its proper context.

Customs' definition of "bound," in contrast, essentially disregards the bookbinder's meaning of the term. The HTSUS specifies a "bound diary." This specificity contemplates the existence of an "unbound diary." The Customs definition, however, would make the meaning of "bound" (fastened regardless of the permanency) so broad that it leaves no room for an "unbound diary." The Government argues that a stack of loose-leaf pages could constitute an unbound diary. While such a stack would certainly be unbound, the record as a whole does not suggest that this stack would qualify as a diary. The definition adopted in this opinion, however, leaves room for a class of goods to qualify as unbound diaries, namely, those not permanently fastened. In sum, the imported articles are not "bound" because they are in loose-leaf binders.

#### IV.

Despite Customs' relative expertise and the reasoning in its classification ruling, for the reasons stated above, this court holds that Mead's day planners are neither "diaries" nor "bound." The classification ruling at issue here lacks the power to persuade under the principles set forth in *Skidmore*. Because the imported articles are properly classified

under the "other" provision of subheading 4820.10.40, this court reverses the decision of the Court of International Trade.

COSTS

Each party shall bear its own costs.

REVERSED

FUJITSU GENERAL AMERICA, INC., (SUCCESSOR-IN-INTEREST TO TEKNIKA ELECTRONICS CORP), PLAINTIFF-APPELLANT v. UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01-1042

(Decided March 20, 2002)

*Brian S. Goldstein*, Duane, Morris & Heckscher LLP, of New York, New York, argued for plaintiff-appellant.

*James A. Curley*, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; and *David M. Cohen*, Director; of Washington, DC. Also on the brief was *John J. Mahon*, Assistant Branch Director, International Trade Field Office, of New York, New York. Of counsel on the brief was *Chi S. Choy*, Office of Assistant Chief Counsel, United States Customs Service, of New York, New York. Of counsel was *Melanie A. Frank*, Attorney, Office of Assistant Chief Counsel for Import Administration, Department of Commerce, of Washington, DC.

Appealed from: United States Court of International Trade  
Judge DONALD C. POGUE

Before SCHALL, GAJARSA, and LINN, *Circuit Judges*.

SCHALL, *Circuit Judge*.

Plaintiff-Appellant Fujitsu General America, Inc. ("Fujitsu") is the successor-in-interest to Teknika Electronics Corp. ("Teknika"). Between 1986 and 1988, Teknika imported into the United States color televisions manufactured in Japan by Fujitsu General Limited (formerly known as General Corporation) ("Fujitsu General"). The color televisions that Teknika imported were subject to a 1971 antidumping finding. See *Television Receiving Sets, Monochrome and Color, From Japan*, 36 Fed. Reg. 4,597 (Dep't Treas. Mar. 10, 1971). Between November of 1997 and February of 1998, the United States Customs Service ("Customs") liquidated entries of the color televisions that occurred between March 20, 1986, and March 11, 1988, and assessed antidumping duties on the entries.<sup>1</sup> The liquidations followed litigation in the United States Court of International Trade between Fujitsu General and the

<sup>1</sup> To the extent relevant to this case, "liquidation" is "the final computation or ascertainment of the duties \* \* \* accruing on an entry." 19 C.F.R. § 159.1 (1997). See *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1118 (Fed. Cir. 1998).

government concerning the proper antidumping duty rate for the color televisions, during which Customs was enjoined by the court from liquidating the entries.

As the successor to Teknika, Fujitsu initiated three protests with respect to Customs' liquidation of the entries.<sup>2</sup> Fujitsu challenged the liquidation of the entries as untimely and the assessment of interest on the antidumping duties found to be due as unlawful. After Customs denied all three protests, Fujitsu brought suit in the Court of International Trade. Fujitsu contended that Customs had improperly failed to liquidate the entries within six months of having received notice that the injunction against liquidation had been removed. According to Fujitsu, pursuant to 19 U.S.C. § 1504(d),<sup>3</sup> that resulted in the entries being deemed liquidated at the rate of duty asserted on entry. Fujitsu also renewed its challenge to the assessment of interest. On cross-motions for summary judgment, the Court of International Trade granted summary judgment in favor of the United States. The court held that, as far as Fujitsu's first and second protests were concerned, it lacked jurisdiction to consider whether the entries at issue were deemed liquidated under section 1504(d). The court based its ruling on the fact that the deemed liquidation claims had not been raised before Customs by protest within 90 days of the challenged liquidations, as required by 19 U.S.C. § 1514(c)(3). *Fujitsu Gen. Am., Inc. v. United States*, 110 F. Supp. 2d 1061 (Ct. Int'l Trade 2000) ("*Fujitsu*"). Next, the Court of International Trade addressed the deemed liquidation claim in Fujitsu's third protest. The court found that the claim had been timely raised in the protest. On the merits, the court determined that since the liquidation challenged in the protest had occurred less than six months after Customs received notice to liquidate the entries at issue, the entries were not deemed liquidated under section 1504(d). *Id.* at 1077. Finally, the court upheld the assessment of interest on the antidumping duties that had been found to be due. Fujitsu now appeals from the court's decision. We affirm.<sup>4</sup>

## BACKGROUND

### I.

The pertinent facts are not in dispute. As noted, the color televisions that were imported by Fujitsu were subject to an antidumping duty. See 19 U.S.C. § 1673. During the relevant period, antidumping duties assessed on color televisions from Japan were subject to periodic review by the United States Department of Commerce ("Commerce"). 19 U.S.C. § 1675(a)(1). After each review, duties were assessed retroactively on the entries covered by the review, and future entries became subject to a deposit requirement at the dumping rate calculated in the review. *Id.*

<sup>2</sup>In the interest of clarity, we hereafter refer to Fujitsu as the importer of the televisions.

<sup>3</sup>Unless otherwise indicated, all statutory references are to the 1994 version of the United States Code, the relevant provisions of which were in place (or substantively identical to provisions in place) during the relevant time period.

<sup>4</sup>On appeal, Fujitsu does not challenge the Court of International Trade's ruling that Customs properly assessed interest on the antidumping duties found to be due. Its sole contention is that no antidumping duties were due, and hence no interest should have been assessed, because the entries at issue should have been deemed liquidated by operation of law at the rates of duty asserted on entry, which were either zero or *de minimis*.

In a series of periodic reviews published between 1981 and 1987, Commerce found the dumping margin for the color televisions imported by Fujitsu to be either zero or *de minimis*. See *Television Receiving Sets, Monochrome and Color, from Japan*, 46 Fed. Reg. 30,163 (Dep't Commerce, June 5, 1981); *Television Receiving Sets, Monochrome and Color, from Japan*, 50 Fed. Reg. 24,278 (Dep't Commerce, June 10, 1985); *Television Receiving Sets, Monochrome and Color, from Japan*, 52 Fed. Reg. 8,940 (Dep't Commerce, Mar. 20, 1987). Thereafter, in a subsequent review published on February 11, 1988, Commerce calculated a dumping margin of 4.06%. *Television Receiving Sets, Monochrome and Color, from Japan*, 53 Fed. Reg. 4050 (Dep't Commerce, Feb. 11, 1988). As a result of these reviews, the televisions imported by Fujitsu during the period from March 20, 1986 until February 11, 1988, required no cash deposit, while televisions imported by Fujitsu between February 11 and March 11, 1988, required a cash deposit of 4.06%. However, Customs did not liquidate the March 20, 1986—March 11, 1988 entries at issue at the above rates, since the administrative review process had been initiated with respect to the entries. *Fujitsu*, 110 F. Supp. 2d at 1067.

On February 11, 1991, Commerce published the results of the administrative review that had been initiated with respect to the 1986–1988 entries. *Television Receiving Sets, Monochrome and Color, from Japan*, 56 Fed. Reg. 5,392 (Dep't Commerce, Feb. 11, 1991). In that review, Commerce calculated a dumping margin for the entries of 35.40%. Fujitsu General, the manufacturer of the televisions, challenged the dumping margin determination by bringing an action in the Court of International Trade under 19 U.S.C. § 1516a(a)(2)(B)(iii). Pursuant to 19 U.S.C. § 1516a(c)(2), the court promptly enjoined Commerce from liquidating the 1986–1988 entries during the pendency of the litigation. See *Fujitsu*, 110 F. Supp. 2d at 1065. In due course, the court granted Commerce's request to remand the case for a recalculation of the dumping margin. After Commerce reduced the dumping margin for the entries from 35.40% to 26.17% in its remand determination, the court affirmed the modified results of the administrative review. See *Fujitsu Gen. Ltd. v. United States*, 883 F. Supp. 728 (Ct. Int'l Trade 1995). Thereafter, on July 3, 1996, this court affirmed the Court of International Trade's approval of Commerce's 26.17% dumping margin determination. See *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034 (Fed. Cir. 1996) ("*Fujitsu General*"). The court's mandate issued on August 26, 1996, and Fujitsu General's time to petition for *certiorari* to the United States Supreme Court expired on October 1, 1996. See *Fujitsu*, 110 F. Supp. 2d at 1065; 28 U.S.C. § 2101(c).

On September 16, 1997, Commerce published notice of the *Fujitsu General* decision in the Federal Register. See 62 Fed. Reg. 48,592 (Dep't Commerce, Sept. 16, 1997). Ten days later, on September 26, 1997, Commerce sent Customs an e-mail instructing it to liquidate the 1986–1988 entries at the affirmed 26.17% dumping margin. Pursuant to those in-



structions, Customs liquidated the entries on multiple occasions between November of 1997 and February of 1998.

Fujitsu filed three separate protests of the liquidations, under 19 U.S.C. § 1514. First, on February 11, 1998, Fujitsu filed Protest No. 2704-98-100059 ("Protest 1"), challenging Customs' assessment of interest in connection with the liquidation of entries on November 14, 1997, and December 5, 1997. *See Fujitsu*, 110 F. Supp. 2d at 1065-66. One month later, Customs denied the protest. *See id.* at 1066. Thereafter, on April 15, 1998, Fujitsu sent Customs a letter in which it sought to supplement Protest 1 with a claim that the protested liquidations were improper because the entries previously had been "deemed liquidated" at the rate and amount of duties asserted at the time of entry more than a decade earlier. *See id.* Customs acknowledged receipt of the letter but refused to reconsider its denial of Protest 1. *See Fujitsu*, 110 F. Supp. 2d at 1066.

On February 11, 1998, the same day it filed Protest 1, Fujitsu filed Protest No. 3001-98-100026 ("Protest 2"). In Protest 2, Fujitsu challenged Customs' assessment of interest on entries liquidated on November 28, 1997. *See id.* Thereafter, on March 30, 1998, before Customs had ruled on Protest 2, Fujitsu supplemented the protest. As in the Case of Protest 1, Fujitsu sought to add the claim that the challenged liquidation was unlawful because the entries were already deemed liquidated. *See id.* On April 22, 1998, Customs denied Protest 2. *See id.*

Finally, on March 24, 1998, Fujitsu filed Protest No. 5301-98-100053 ("Protest 3"). In that protest, Fujitsu challenged Customs' assessment of interest in connection with the liquidation of entries on February 27, 1998. *See id.* Subsequently, on April 1, 1998, Fujitsu supplemented Protest 3 with a deemed liquidation claim. Fujitsu sent its April 1, 1998 letter alleging deemed liquidation before Customs had ruled on Protest 3, and, unlike the deemed liquidation claims filed in connection with Protests 1 and 2, within ninety days of the protested liquidation. *See id.* Customs denied Protest 3 on April 10, 1998.

## II.

Fujitsu filed suit in the Court of International Trade to contest the denial of its protests.<sup>5</sup> In due course, the parties cross-moved for summary judgment. Thereafter, in an opinion issued on August 15, 2000, the Court of International Trade denied Fujitsu's motion and granted the government's. The court held that it lacked jurisdiction to hear the deemed liquidation claims asserted in connection with Protests 1 and 2 because the claims had not been timely raised before Customs. *See Fujitsu*, 110 F. Supp. 2d at 1067-74. As far as Protest 3 was concerned, the court held that it had jurisdiction to adjudicate the deemed liquidation claim relating to the February 27, 1998, entries because Fujitsu had timely raised the claim before Customs. The court rejected the claim on

<sup>5</sup> Fujitsu filed two separate actions. Because the two actions essentially "shared the same legal issues as well as the same basic circumstances," the Court of International Trade consolidated them *sua sponte* with the parties' permission. *See Fujitsu*, 110 F. Supp. 2d at 1066 n.1.



the merits, however. The court concluded that Customs had liquidated the entries at issue within six months of receiving notice of the removal of the suspension of liquidation that had been in effect pending the litigation involving the final results of the administrative review, as required by 19 U.S.C. § 1504(d).<sup>6</sup> See *id.* at 1074-78. Fujitsu timely appealed the court's ruling. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

#### DISCUSSION

Fujitsu's appeal challenges two rulings of the Court of International Trade. The first ruling is the court's holding that it lacked jurisdiction to consider the deemed liquidation claims relating to Protests 1 and 2, because Fujitsu failed to timely protest either the liquidations of November 14 and December 5, 1997 (Protest 1), or the liquidation of November 28, 1997 (Protest 2). The second ruling is the court's holding that the entries whose liquidation Fujitsu challenged in Protest 3 were not deemed liquidated at the rate of duty asserted on entry.

Both the jurisdictional ruling relating to Protests 1 and 2 and the merits ruling relating to Protest 3 were based upon the Court of International Trade's interpretation of the relevant statutory provisions. We review the court's interpretation of those statutory provisions *de novo*. See *VWP of Am., Inc. v. United States*, 175 F.3d 1327, 1334 (Fed. Cir. 1999). In Part I below, we address the jurisdictional issues relating to the deemed liquidation claims asserted in connection with Protests 1 and 2. In Part II, we address the merits of the deemed liquidation claim in Protest 3.

#### I.

##### A. The jurisdictional scheme

The jurisdiction of the Court of International Trade is set forth in 28 U.S.C. § 1581. The two provisions of the statute that are relevant to this case are sections 1581(a) and 1581(i).

Under section 1581(a), the Court of International Trade has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." Section 515 is codified at 19 U.S.C. § 1515. Section 1515 provides for Customs' review and subsequent allowance or denial of protests that are "filed in accordance with" 19 U.S.C. § 1514. 19 U.S.C. § 1515(a). Section 1514(a) lists the decisions of Customs that may be the subject of protests. Included are decisions relating to "the liquidation or reliquidation of an entry." 19 U.S.C. § 1514(a)(5). Section 1514(a) states that a Customs decision that may be the subject of a protest shall be "final and conclusive upon all persons \* \* \* unless a protest is filed in accordance with this section." The time for filing a protest of a decision described in section 1514(a) is "within ninety days after notice of liquidation." 19 U.S.C. § 1514(c)(3). We have held that the Court of International Trade's au-

<sup>6</sup> The Court of International Trade also ruled that Customs properly assessed interest on the antidumping duties found to be due on the entries at issue. As noted above, that ruling is not before us.

thority to hear a claim under section 1581(a) depends upon the importer raising the claim in a valid protest filed with Customs within the prescribed 90-day period, or alternatively, in a protest coming within an exception that excuses a failure to meet the deadline. See *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345-46 (Fed. Cir. 1995).

Section 1581(i) provides in pertinent part as follows:

In addition to the jurisdiction conferred upon the Court of International Trade by subsection \* \* \* (a) of this section \* \* \*, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States \* \* \* that arises out of any law of the United States providing for \* \* \* administration and enforcement with respect to the matters referred to in \* \* \* subsection \* \* \* (a) \* \* \* of this section.

We have described section 1581(i) as embodying a "residual" grant of jurisdiction, *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1584 n.4 (Fed. Cir. 1994), and we have stated that "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)).

*B. Whether, under 28 U.S.C. § 1581(a), the Court of International Trade had jurisdiction over the deemed-liquidation claim relating to Protest 2*

Fujitsu points to 28 U.S.C. § 1581(a) and argues that the Court of International Trade erred in holding that it lacked jurisdiction over the deemed liquidation claim relating to Protest 2.<sup>7</sup> As just seen, subsection (c)(3) of section 1514 requires that an importer file a protest challenging a Customs decision within 90 days of receiving notice of liquidation. On February 11, 1998, Fujitsu timely filed Protest 2, challenging Customs' assessment of interest on the duties due on the entries liquidated on November 28, 1997. However, it submitted the letter raising its deemed liquidation claim on March 30, 1998, more than ninety days after liquidation. See *Fujitsu*, 110 F. Supp. 2d at 1070. Consequently, unless the deemed liquidation claim came within a recognized exception to the 90-day deadline prescribed by section 1514(c)(3), the Court of International Trade lacked authority to review the claim under section 1581(a).

Fujitsu attempts to avail itself of such an exception by arguing that its deemed liquidation claim was a "new ground" in support of the original protest. The "new ground" exception to the 90-day filing requirement in 19 U.S.C. § 1514(c)(3) is found in 19 U.S.C. § 1514(c)(1). Section 1514(c)(1) provides in relevant part that "[n]ew grounds in support of objections raised by a valid protest \* \* \* may be presented for consideration in connection with the review of such protest pursuant to section

<sup>7</sup> Fujitsu does not assert that the Court of International Trade erred in not asserting section 1581(a) jurisdiction with respect to the deemed liquidation claim relating to Protest 1.

1515 of this title at any time prior to the disposition of the protest in accordance with that section."

In *Pagoda Trading Corp. v. United States*, 804 F.2d 665 (Fed. Cir. 1986), we explained that in order for a supplemental deemed liquidation claim to qualify as a "new ground" in support of a timely protest, the timely protest must be sufficient to advise Customs that liquidation is being challenged, and the deemed liquidation claim must be raised before Customs rules on the protest. *Id.* at 668-69. Applying the two-part *Pagoda* standard, Fujitsu asserts that its timely protest of the assessment of interest put Customs on notice that the liquidation of entries on November 28, 1997, was being challenged. It also asserts, and it is undisputed, that its March 30, 1998 filing of the deemed liquidation claim predated Customs' April 22, 1998 rejection of the protest. Therefore, Fujitsu argues, its deemed liquidation claim constituted a "new ground" in support of its timely protests of the assessment of interest. Accordingly, the Court of International Trade erred in failing to consider it under § 1581(a).

We are unable to agree with Fujitsu. In *Pagoda*, we stated that, in order to qualify as a "new ground" in support of a protest, a supplemental claim must "challenge[] the same 'decisions' as those challenged in the original protest." 804 F.2d at 668. The need to determine whether two claims challenge the same Customs decision, thus permitting the supplemental claim to satisfy the requirements for a "new ground," follows from the language of 19 U.S.C. § 1514(a). Section 1514(a) sets forth the protestable "decisions of the Customs Service." In doing so, it lists "all charges or exactions" in section 1514(a)(3) separately from "the liquidation or reliquidation of an entry" in section 1514(a)(5).<sup>8</sup> In other words, the statute identifies charge or exaction decisions, such as the interest assessments in this case, as separate and distinct from liquidation decisions.

The conclusion that interest assessments and liquidations involve different Customs decisions for purposes of section 1514 is supported by *New Zealand Lamb Co. v. United States*, 40 F.3d 377 (Fed. Cir. 1994). At issue in that case were eight entries of lamb meat by New Zealand Lamb. Customs effected final liquidation of six of the entries on December 15, 1989, and two of the entries on December 22, 1989. When it did so, it determined that countervailing duties were due in an amount greater than what had been deposited for estimated duties. It therefore assessed such additional duties when it liquidated the two sets of entries. *Id.* at 378-79. Subsequently, on March 23, 1990, Customs billed New Zealand Lamb for interest on the additional duties. The billing came ninety-nine days after the six December 15, 1989 liquidations and ninety-two days after the December 22, 1989 liquidations. On June 21, 1990, exactly ninety days after it was billed for the interest, New Zealand Lamb filed a

<sup>8</sup> We have held that Customs' assessment of interest falls within the "all charges and exactions" language of section 1514(a)(3). See, e.g., *Castelazo & Assocs. v. United States*, 126 F.3d 1460, 1462 (Fed. Cir. 1997). Thus, when Fujitsu protested the assessment of interest on antidumping duties that Commerce had found to be due, it was lodging a section 1514(a)(3) protest.

protest with Customs pursuant to 19 U.S.C. § 1514(c), in which it challenged the assessment of interest. *Id.* at 379.

In *New Zealand Lamb*, we considered whether the protest of Customs' assessment of interest on the countervailing duties, which was filed more than ninety days after liquidation but within ninety days of the interest assessment, was timely under § 1514(c). We held that the protest was timely. In so holding, we rejected the government's argument that, by operation of 19 U.S.C. § 1677g (1988), the eight liquidations for increased countervailing duties amounted to assessments of interest, irrespective of whether interest was mentioned in the bulletin notices liquidating the entries.<sup>9</sup> *Id.* at 381. We noted that interest on the underpayment of duties was a charge within the "jurisdiction of the Secretary of the Treasury" under 19 U.S.C. § 1514(a)(3). Continuing, we stated that there could not be a decision on a charge for purposes of starting the running of a limitations period until the party levying the charge announced that the charge was being levied and stated the amount of the charge, or the method of computing the charge. *Id.* at 382. We concluded:

[T]he liquidations in this case, which made no mention of interest, were not decisions regarding interest for purposes of starting the running of the § 1514 limitations period against New Zealand Lamb. Such a decision did not come until March 23, 1990, when Customs billed New Zealand Lamb for the interest.

*Id.* (footnote omitted). See also *Castelazo*, 126 F.3d at 1463 (stating that under section 1514 "Customs' decisions on charges or exactions, such as assessed interest, are independent of its decisions on liquidation or re-liquidation.").

Fujitsu's deemed liquidation claim relating to Protest 2 was not timely under section 1514(c)(3). Neither did the claim constitute a "new ground" in support of the challenge to the assessment of interest in Protest 2. For these reasons, the Court of International Trade did not err in refusing to assert jurisdiction over the claim under 28 U.S.C. § 1581(a).

*A. Whether, under 28 U.S.C. § 1581(i), the Court of International Trade had jurisdiction over the deemed liquidation claims relating to Protests 1 and 2*

Alternatively, Fujitsu contends that 28 U.S.C. § 1581(i) vested the Court of International Trade with the authority to review its deemed liquidation claim relating to Protest 2. It also contends that the statute gave the court authority to review its deemed liquidation claim relating to Protest 1. We disagree. Fujitsu's argument runs afoul of the rule, noted above, that "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection

<sup>9</sup>Section 1677g provides, in relevant part, that "[i]nterest shall be payable on \* \* \* underpayments of amounts deposited on merchandise entered \* \* \* for consumption on and after the date of publication of a countervailing \* \* \* duty order." 19 U.S.C. § 1677g(a).

would be manifestly inadequate." *Norcal/Crosetti Foods*, 963 F.2d at 359 (quoting *Miller*, 824 F.2d at 963).

In this case, "jurisdiction under another subsection of § 1581 could have been available," and "the remedy provided under that other subsection" would not have been "manifestly inadequate." Fujitsu could have invoked the jurisdiction of the Court of International Trade under 28 U.S.C. § 1581(a) if, pursuant to 19 U.S.C. § 1514(a)(5), it had timely protested the liquidations of November 14 and December 5, 1997 (Protest 1), and the liquidation of November 28, 1997 (Protest 2). Indeed, Fujitsu was able to invoke the jurisdiction of the court in the case of its challenge to the liquidation of February 27, 1998 (Protest 3), because it timely protested the liquidation.

Generally, an importer's failure to file a timely protest precludes the Court of International Trade from exercising its section 1581(i) residual jurisdiction. See *Juice Farms*, 68 F.3d at 1346. Fujitsu argues, nevertheless, that our decision in *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550 (Fed. Cir. 1997), supports its contention that the Court of International Trade erred in not invoking its § 1581(i) jurisdiction to consider Fujitsu's deemed liquidation claims. *Cherry Hill* does not help Fujitsu, however.

In *Cherry Hill*, Cherry Hill Textiles, Inc., ("Cherry Hill") imported textile-dyeing machines from Taiwan. The machines were entered as duty free through the Port of Newark, New Jersey, on September 18, 1987. On October 28, 1988, more than thirteen months after the date of entry, Customs liquidated the entry as dutiable in the amount of \$12,220.62. *Cherry Hill*, 112 F.3d at 1551. Customs gave notice to Cherry Hill of the liquidation and subsequently demanded payment from Cherry Hill's surety, International Cargo & Surety Insurance Co. ("IC & S") under its bond. IC & S refused to make payment. It did not, however, file a formal protest under 19 U.S.C. § 1514 of either the liquidation or the demand for payment. *Id.*

After the 90-day period for filing a protest had passed, the government filed an enforcement action in the Court of International Trade in which it sought to recover the \$12,220.62 in assessed duties. In due course, the government moved for summary judgment. In so doing, it contended that IC & S's failure to file a protest against either the liquidation or the demand for payment under the bond rendered the October 28, 1988, liquidation "final and conclusive" within the meaning of 19 U.S.C. § 1514(a), so that judicial review of IC & S's affirmative defenses was precluded. IC & S argued in response that the provision of section 1514(a) that makes unprotested liquidations "final and conclusive" applies to actions brought by importers or sureties to recover excess duty deposits, but not to government enforcement actions for unpaid duties. The Court of International Trade rejected IC & S's argument and granted summary judgment for the government in the full amount of the assessed duties, plus interest. *Id.* IC & S then appealed to this court.

We framed the issue before us in *Cherry Hill* as follows:

It is undisputed that an administrative protest must be filed if an importer or surety wishes to file suit in the Court of International Trade challenging the liquidation of a Customs entry. The principal issue in this case is whether an importer or surety must file such an administrative protest if the importer or surety wishes to defend against a government enforcement action for the underpayment of duties by challenging the lawfulness of a liquidation.

*Id.* at 1552. On appeal, IC & S advanced two contentions. First, it argued that the protest requirement of section 1514 applies to actions brought by importers or sureties for the refund of duties paid, but that it does not apply to enforcement actions brought by the government to collect underpayments of duties. *Cherry Hill*, 112 F.3d at 1551. Accordingly, IC & S claimed that it was entitled to challenge the government's enforcement action, even though it had not filed a timely protest of the liquidation with Customs. We rejected this argument. In so doing, we stated: "The language of section 1514, that a liquidation will be 'final and conclusive' unless protested, is sufficiently broad that it indicates that Congress meant to foreclose unprotected issues from being raised in any context, not simply to impose a prerequisite to bringing suit." *Id.* at 1557.

IC & S also argued that summary judgment should not have been granted in favor of the government because the entry of September 18, 1987, was "deemed liquidated" by operation of law when Customs failed to liquidate it within one year of the date of entry. See 19 U.S.C. § 1504(a). IC & S urged that it should not have been required to protest the October 28, 1988, liquidation in order to be entitled to argue later that Customs was legally foreclosed from liquidating the entry anew after the entry had already been deemed liquidated. *Cherry Hill*, 112 F.3d at 1558. We looked more favorably on this argument by IC & S, which we characterized as a "narrower ground for reversal." *Id.* We pointed out that in *United States v. Sherman & Sons Co.*, 237 U.S. 146 (1915), the Supreme Court concluded that "an importer who is subjected to a reliquidation based on a charge of fraud is not relegated to the protest and appeal mechanism, but may challenge the finding of fraud in a government enforcement action brought in court even if the importer filed no protest of the reliquidation." *Cherry Hill*, 112 F.3d at 1554 (citing *Sherman*, 237 U.S. at 158). We reasoned in *Cherry Hill* that "'deemed liquidation' under section 1504 has the same effect as the expiration of the time for reliquidation in *Sherman*: it subjects any further collection efforts by the government in connection with the same entry to dismissal for failure to state a claim upon which relief can be granted." *Id.* at 1559.<sup>10</sup> Accordingly, we held that IC & S could raise deemed liquidation as a defense in the government's enforcement action.

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<sup>10</sup> The reliquidation in *Sherman* came more than one year after the original liquidation.



The critical difference between *Cherry Hill* and this case, of course, is that Fujitsu is not seeking to use its deemed liquidation claim as a shield in a government enforcement action. Rather, it is seeking to use the claim as a sword in a refund action under 28 U.S.C. § 1581(i). As noted above, the *Cherry Hill* court recognized that "[i]t is undisputed that an administrative protest must be filed if an importer or surety wishes to file suit in the Court of International Trade challenging the liquidation of a Customs entry." 112 F.3d at 1552. In addition, as discussed above, jurisdiction may not be invoked under § 1581(i) "when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Norcal/Crosetti Foods*, 963 F.2d at 359 (quoting *Miller*, 824 F.2d at 963). That plainly is not the case here since, as already noted, Fujitsu could have timely protested Customs' purported liquidations under 19 U.S.C. § 1514(a)(5). In that event, the Court of International Trade would have had jurisdiction over Fujitsu's suit under 28 U.S.C. § 1581(a). We agree with the Court of International Trade that "[t]o find that *Cherry Hill* affords Fujitsu jurisdiction under 28 U.S.C. § 1581(i) to raise its deemed liquidation argument in the circumstances of this case would require us to create an exception to the well-established [rule with respect to] § 1581(i) [jurisdiction] that we are unwilling to make." *Fujitsu*, 110 F. Supp. 2d at 1073. Accordingly, we will not disturb the Court of International Trade's ruling that it lacked jurisdiction under section 1581(i) to consider Fujitsu's Protest 1 and Protest 2 deemed liquidation claims.

## II.

We turn now to Fujitsu's deemed liquidation claim relating to the entries that Customs liquidated on February 27, 1998 (Protest 3). The Court of International Trade exercised jurisdiction over this claim because Fujitsu timely asserted it in connection with Protest 3 on April 1, 1998. On the merits, the court rejected Fujitsu's argument that the failure of Customs to liquidate the entries within six months of our July 3, 1996, decision in *Fujitsu General* meant that, pursuant to 19 U.S.C. § 1504(d), the entries were deemed liquidated at the rate of duty asserted at entry.

### A. Decision of the Court of International Trade on Fujitsu's deemed liquidation claim relating to Protest 3.

Section 1504(d) governs the deemed liquidation of entries whose liquidation previously was suspended by a court order. The statute provides that, except in circumstances not relevant here,

when a suspension [of liquidation] required by \* \* \* court order is removed, the Customs Service shall liquidate the entry \* \* \* within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry \* \* \* not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as hav-

ing been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

19 U.S.C. § 1504(d). Thus, in order for a deemed liquidation to occur, (1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice. The Court of International Trade rejected Fujitsu's deemed liquidation claim because it ruled that Customs had liquidated the entries at issue within six months of September 16, 1997, the date on which Commerce published notice in the Federal Register that the injunction suspending liquidation had been removed. 110 F Supp. 2d at 1077.

In analyzing Fujitsu's claim, the Court of International Trade first addressed the question of when the suspension of liquidation that was imposed during the *Fujitsu General* litigation was "removed" for purposes of section 1504(d). The court pointed out that 19 U.S.C. § 1516a(e) "explains how liquidation will proceed where entries are subject to a determination that is being judicially reviewed pursuant to § 1516a." *Id.* at 1075. Section 1516a(e) provides as follows:

**(e) Liquidation in accordance with final decision**

If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—

(1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is [sic] entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

(2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,

shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

Liquidation of the Protest 3 entries was enjoined pursuant to 19 U.S.C. § 1516a(c)(2). The Court of International Trade determined that, as used in section 1516a(e), the term "final" means "conclusive" and that a court decision is conclusive when it can no longer be appealed. *Fujitsu*, 110 F Supp. 2d at 1075. The court reasoned that our decision of July 3, 1996 in *Fujitsu General* could not have served as notice to Customs of the removal of the court-ordered suspension because, under section 1516a(e)(2), the injunction did not dissolve on that date. Rather, the injunction dissolved on October 1, 1996, when "the time allowed for applying for a writ of certiorari for review in the U.S. Supreme Court expired." *Id.* In reaching its conclusion as to when our decision in *Fujitsu General* became "final," the Court of International Trade relied on decisions of this court holding that a decision of the Court of International Trade is not "final" for purposes of section 1516a(e) when it has been

appealed to the Federal Circuit. See *Hosiden Corp v. Advanced Display Mfrs. of America*, 85 F.3d 589, 591 (Fed. Cir. 1996); *Timken Co. v. United States*, 893 F.2d 337, 339-40 (Fed. Cir. 1990).

Having determined that our decision in *Fujitsu General*, which caused the suspension of liquidation to be removed, became final on October 1, 1996, the Court of International Trade turned to the question of when Customs received notice that the suspension had been removed. Preliminarily, the court rejected the proposition that issuance of the *Fujitsu General* decision itself constituted notice for purposes of section 1504(d). Noting that "Customs' role in antidumping matters is purely ministerial," see *Mitsubishi Elects. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994), the court stated that it would not "attribute notice to Customs of a court decision reviewing a Commerce determination made under 19 U.S.C. § 1516a(a) without publication of notice of the court decision by Commerce in the Federal Register." *Fujitsu*, 110 F. Supp. 2d at 1077 (footnote omitted). Accordingly, the court held that Customs received notice of the removal of the suspension of liquidation relating to the entries at issue in Protest 3 only when Commerce<sup>11</sup> published the following notice in the Federal Register on September 16, 1997:

As there is now a final and conclusive court decision in this action, we are amending our final results of review in this matter and we will subsequently instruct the U.S. Customs Service to liquidate entries subject to this review. \* \* \* Pursuant to 19 U.S.C. § 1516a(e), we are now amending the final results of administrative review for television receivers, monochrome and color, from Japan, with respect to [Fujitsu General Limited], for the above-referenced periods. The revised weighted-average margin for these periods is 26.17 percent.

62 Fed. Reg. 48,952. The court also rejected the government's argument that Customs did not receive notice of the removal of the suspension of liquidation until Commerce e-mailed liquidation instructions to Customs on September 26, 1997. See *Fujitsu*, 110 F. Supp. 2d at 1077.

The Court of International Trade ruled that since Customs had liquidated the Protest 3 entries on February 27, 1998, within six months of the September 16, 1997 Federal Register notice, the requirements for deemed liquidation under 19 U.S.C. § 1504(d) were not met. *Id.* at 1077.

The Court of International Trade recognized the long delay between October 1, 1996, when "the court-ordered injunction dissolved," and September 16, 1997, when Commerce finally published the required notice in the Federal Register. *Id.* at 1078. It declined, however, to hold that Fujitsu's merchandise was deemed liquidated because of Commerce's delay in publishing notice of the removal of the suspension of liquidation. The court reasoned that such a remedy would be overly

<sup>11</sup> As seen above, section 1516a(e) refers to "publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision." The term "Secretary" refers to the Secretary of the Treasury. See 19 U.S.C. § 1516a(f)(4). The term "administering authority" refers to the Secretary of Commerce. See 19 U.S.C. §§ 1516a(f)(1), 1677(1).

broad and would constitute a windfall to Fujitsu, especially since Fujitsu could have brought an action under 28 U.S.C. § 1581(i)(4) to compel Commerce to publish notice and give liquidation instructions to Customs. See *id.* (citing *Am. Permac, Inc. v. United States*, 642 F. Supp. 1187, 1192 n.8 (Ct. Int'l Trade 1986)) (importer may prevent Commerce delay in issuing liquidation instructions by bringing mandamus action); see also *Timken*, 893 F.3d at 342 (affirming grant of importer's application for a writ of mandamus forcing Commerce to publish notice of court decision). The court therefore granted the government's motion for summary judgment.

### *B. Fujitsu's appeal*

Fujitsu challenges the Court of International Trade's rejection of its deemed liquidation claim relating to Protest 3. Pointing to the statutory language that permits Customs to receive notice of the removal of a suspension of liquidation from "the Department of Commerce, other agency, or a court with jurisdiction over the entry," 19 U.S.C. § 1504(d), Fujitsu asserts that through the decision in *Fujitsu General*, Customs was provided with notice of the removal of the suspension of liquidation. Fujitsu argues that since *Fujitsu General* issued on July 3, 1996, and since Customs did not liquidate the Protest 3 entries until more than six months later, on February 27, 1998, the requirements of 19 U.S.C. § 1504(d) for deemed liquidation were met. Consequently, the Protest 3 entries were deemed liquidated at the rate of duty asserted at the time of entry, which was zero.

The question we must answer is this: When, as a matter of law, did Customs receive notice of the removal of the suspension of liquidation? If, as Fujitsu argues, notice was received on July 3, 1996, when *Fujitsu General* issued, Fujitsu wins. The reason is that more than six months passed before Customs liquidated the entries on February 27, 1998. If, as the Court of International Trade held, notice was received on September 16, 1997, when Commerce published notice of the removal in the Federal Register, the government wins. The reason is that Customs liquidated the entries within six months of that date, on February 27, 1998.

(1) Preliminarily, we agree with the Court of International Trade that the suspension of liquidation was removed on October 1, 1996, when the time for petitioning the Supreme Court for a writ of *certiorari* expired. In *Timken*, 893 F.2d 337, we addressed the question of whether a decision of the Court of International Trade that was on appeal to the Federal Circuit was "final" for purposes of 19 U.S.C. § 1516a(e). Answering the question we stated: "We are of the opinion that an appealed CIT decision is not a 'final court decision' within the plain meaning of § 1516a(e)." *Id.* at 339. We explained that, in section 1516a(e), the term "final court decision" must be read together with the words that follow it: "in the action." We reasoned that "[a]n 'action' does not end when one court renders a decision but continues through the appeal process." *Id.* We see no reason not to extend the logic of *Timken* to the question

before us in this case.<sup>12</sup> We do not think that, for present purposes, the "appeal process" in a case is completed until all possible appeals are exhausted. Thus, there is not a "final court decision" in an action that originates in the Court of International Trade and in which there is an appeal to the Federal Circuit until, following the decision of the Federal Circuit, the time for petitioning the Supreme Court for *certiorari* expires without the filing of a petition.

(2) Having determined that the suspension of liquidation was removed on October 1, 1996, we turn to the question of notice. As already seen, section 1504(d) requires that Customs receive notice that a suspension of liquidation has been removed from "the Department of Commerce, other agency, or a court with jurisdiction over the entry." There is no evidence in the record that Customs received such notice prior to September 16, 1997. It is true, as Fujitsu points out, that on or about July 3, 1996, the Clerk of the Federal Circuit served counsel for the government, the Department of Justice, with the decision in *Fujitsu General*. That fact does not help Fujitsu, however. The Justice Department represented Commerce, not Customs, before this court. Service of the *Fujitsu General* decision upon it did not constitute notice to Customs.

Fujitsu argues, nevertheless, that our decision in *Fujitsu General* was available in a variety of commercially available print and electronic media, thus providing Customs with notice for purposes of 19 U.S.C. § 1504(d). The problem with this argument is that the statute requires that Customs receive notice that a suspension of liquidation has been removed from "the Department of Commerce, other agency, or a court with jurisdiction over the entry." General print or electronic media publication does not satisfy that requirement. In any event, there is no evidence that in fact Customs received general media notice of the *Fujitsu General* decision.

(3) Because no earlier date qualifies, we hold that September 16, 1997 is the earliest date upon which Customs could be deemed to have received notice of the removal of the suspension of liquidation. That is the date upon which Commerce published notice of the *Fujitsu General* decision in the Federal Register.

The government argues, however, that the correct notice date is September 26, 1997, when Commerce e-mailed liquidation instructions to Customs. As noted above, the Court of International Trade rejected that view and ruled that September 16, 1997, was the date upon which notice was received. We agree with the Court of International Trade that it was Commerce's publication of notice of the *Fujitsu General* decision in the Federal Register on September 16, 1997, that constituted notice to Customs under section 1504(d) that the suspension of liquidation had been removed.

<sup>12</sup> In *Timken*, we expressly declined to consider the question of "whether a decision of [the Federal Circuit] is 'final' within the meaning of § 1516a(e) before the time for application for certiorari to the Supreme Court expires." 893 F.2d at 340 n.5.

Our recent decision in *International Trading Co. v. United States*, No. 00-1577, 2002 U.S. App. LEXIS 3299 (Fed. Cir. Mar. 1, 2002), is instructive. In that case, the liquidation of certain entries of merchandise subject to an antidumping order was suspended while Commerce undertook an administrative review of the order. The suspension of liquidation was pursuant to 19 U.S.C. § 1673b(d).<sup>13</sup> On February 12, 1996, Commerce published the final results of the administrative review in the Federal Register. The Final Results announced an antidumping duty rate of 42.31% for the merchandise. *Id.* at \*2. The next day, Commerce sent an e-mail message to Customs. In the message, Customs referred to the Federal Register entry of the previous day and noted that the administrative review had been completed. However, it told Customs not to liquidate any entries covered by the review until it received liquidation instructions. *Id.* at \*3. More than six months later, on August 29, 1996, Commerce sent an e-mail message to Customs directing it to assess antidumping duties at the rate of 42.31% on the merchandise. The e-mail message stated that the instructions constituted the removal of the suspension of liquidation that had been in effect during the administrative review. Less than six months later, in October of 1996, Customs liquidated the entries and assessed antidumping duties at the rate of 42.31% of the entered value. *Id.* at \*3.

International Trading Company ("ITC"), the importer of the merchandise, filed a formal protest. In the protest, it argued that the entries were deemed liquidated by operation of law under 19 U.S.C. § 1504(d) at the rate asserted at entry, which was the deposit rate of 2.72%. ITC contended that the entries were deemed liquidated because Customs had failed to liquidate them within six months after receiving notice of the removal of the suspension of liquidation. *Id.* at \*4. After Customs denied the protest, ITC filed an action in the Court of International Trade, in which it asserted that the entries should have been deemed liquidated at the deposit rate.

The Court of International Trade held that the statutory suspension of liquidation had been removed upon the publication of the final results of the administrative review and that the e-mail message sent to Customs the following day provided notice to Customs that the suspension of liquidation had been lifted. *Int'l. Trading Co. v. United States*, 110 F. Supp. 2d 977, 988 (Ct. Int'l Trade 2000). Accordingly, the court concluded that Customs had failed to liquidate the entries within six months after receiving notice of the removal of the suspension of liquidation. The court therefore held that the entries were deemed liquidated at the 2.72% deposit rate. *Id.* The government appealed the ruling to this court.

<sup>13</sup> Section 1673b(d) provides, in part, that after an affirmative preliminary determination that there exists "a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value," the administering authority (Commerce) "shall order the suspension of liquidation of all entries of merchandise subject to the determination." Simply put, "[l]iquidation is suspended \* \* \* because it is not possible \* \* \* to determine what duties will be assessed against those entries." *Int'l. Trading*, 2002 U.S. App. LEXIS 3299, at \*6-7.



On appeal, we affirmed the decision of the Court of International Trade that the entries at issue were deemed liquidated under 19 U.S.C. § 1504(d). In so doing, we determined that Commerce's publication of the final results of the administrative review in the Federal Register constituted notice to Customs within the meaning of section 1504(d). *Int'l. Trading*, 2002 U.S. App. LEXIS 3299, at \*17. We stated:

[T]he date of publication provides an unambiguous and public starting point for the six-month liquidation period, and it does not give the government the ability to postpone indefinitely the removal of suspension of liquidation (and thus the date by which liquidation must be completed) as would be the case if the six-month liquidation period did not begin to run until Commerce sent a message to Customs advising of the removal of suspension of liquidation. Beyond that, treating the date of notification as separate from the date of publication could lead to messy factual disputes about when Customs actually received notice of the removal of the suspension of liquidation. As in this case, the courts would be required to referee debates about what kind of communication from Commerce relating to the announcement of the final results constituted a qualifying "notice" of the removal of suspension.

*Id.* at \*18-19.

We think the rationale articulated in *International Trading* applies in this case. The Court of International Trade enjoined liquidation in *Fujitsu General* pending the litigation. It did so pursuant to 19 U.S.C. § 1516a(c)(2).<sup>14</sup> Thereafter, the suspension of liquidation was removed when the litigation came to an end. It is just as important that there be "an unambiguous and public starting point for the six-month liquidation period" under these circumstances as it is when liquidation of entries is suspended pending an administrative review and thereafter the suspension is removed when the final results of the review are announced. We therefore conclude that Customs received notice of the removal of the suspension of liquidation on September 16, 1997, when Commerce published notice of the *Fujitsu General* decision in the Federal Register. As noted above, in the Federal Register notice, Commerce stated that it would be instructing Customs to liquidate the 1986-1988 entries. This was the first notification that the suspension of liquidation was being removed. Because Customs liquidated the Protest 3 entries less than six months later, on February 27, 1998, the requirements of 19 U.S.C. § 1504(d) for deemed liquidation were not met.

(4) Fujitsu argues, however, that Customs' liquidation of the Protest 3 entries within six months of the Federal Register notice does not end the issue. As it did in the Court of International Trade, it points to 19 U.S.C. § 1516a(e). As seen above, that statute provides that if a "cause of action is sustained in whole or in part by the United States Court of Appeals for

<sup>14</sup> Section 1516a(c)(2) provides that "the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the \* \* \* administering authority \* \* \* upon request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances."

the Federal Circuit[.]) \* \* \* entries, the liquidation of which was enjoined under [19 U.S.C. § 1516a(c)(2)], shall be liquidated in accordance with the final court decision in the action." The statute further provides that "notice of the court decision shall be published within ten days from the date of the issuance of the court decision."<sup>15</sup> Fujitsu focuses on the fact that although the *Fujitsu General* decision issued on July 3, 1996, it was not until September 16, 1997, that Commerce published notice of the decision in the Federal Register. Fujitsu argues that the government should not be allowed to "sidestep" the six-month limitation period in 19 U.S.C. § 1504(d) by having Commerce ignore for over a year the ten-day publication requirement in section 1516a(e).

Commerce's unexplained delay in publishing notice of the *Fujitsu General* decision, frustrating though it may be, does not change the result in this case. Section 1504(d) and section 1516a(e) are separate statutes. Section 1504(d) governs deemed liquidation. Deemed liquidation under section 1504(d) can occur only if Customs fails to liquidate entries within six months of having received notice of the removal of a suspension of liquidation. In addition, there is no language in section 1516a(e) that attaches a consequence to a failure by Commerce to meet the ten-day publication requirement, let alone the consequence of deemed liquidation under section 1504(d). See *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989) (government's failure to meet a statutory deadline for the liquidation of entries under a prior version of section 1504, in the absence of "consequential language" associated with the deadline, did not result in a deemed liquidation). Under these circumstances, there simply is no basis upon which we could hold that because Commerce failed to timely publish notice of our decision in *Fujitsu General*, the entries at issue in Protest 3 were deemed liquidated under 19 U.S.C. § 1504(d).

Finally, a ruling that a deemed liquidation under section 1504(d) results from Commerce's failure to comply with section 1516a(e)(2) would necessarily equate the former provision's requirement that Customs receive notice of the removal of a suspension of liquidation with the latter provision's instruction to publish "notice of the court decision." 19 U.S.C. §§ 1504(d), 1516a(e)(2). However, the publication of a court decision in a case does not necessarily result in Customs' receipt of notice that a suspension of liquidation that was in effect during the case has been removed. For example, our decision in *Fujitsu General* does not even mention the suspension of liquidation that was ordered by the Court of International Trade. We do not think it would be consistent with the statutory scheme to hold that Commerce's publication of notice of a court decision and Customs' receipt of notice are synonymous for purposes of starting the six-month time period for liquidation in section

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<sup>15</sup> *Fujitsu General's* "cause of action" challenged the 35.40% antidumping duty rate found in the administrative review. There is therefore no dispute that the cause of action was "sustained in whole or in part" by our decision in *Fujitsu General*, which affirmed Commerce's determination, on remand, of a reduced 26.17% antidumping duty rate.

1504(d).<sup>16</sup> See *Mitsubishi*, 44 F.3d at 977 ("Customs has a merely ministerial role in liquidating antidumping duties \* \* \*").

#### CONCLUSION

The Court of International Trade did not err in holding that it lacked jurisdiction to consider Fujitsu's deemed liquidation claims relating to Protests 1 and 2. Neither did the court err in rejecting Fujitsu's deemed liquidation claim relating to Protest 3. Accordingly, the decision of the court is

#### COSTS

No costs.

#### AFFIRMED

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TURTLE ISLAND RESTORATION NETWORK, TODD STEINER, THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, THE HUMANE SOCIETY OF THE UNITED STATES, AND THE SIERRA CLUB, PLAINTIFFS-APPELLANTS v. DONALD L. EVANS, SECRETARY OF COMMERCE, COLIN L. POWELL, SECRETARY OF STATE, PAUL H. O'NEILL, SECRETARY OF THE TREASURY, DAVID B. SANDLAW, ASSISTANT SECRETARY OF STATE FOR THE BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, PENELOPE D. DALTON, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, AND ALAN P. LARSON, UNDER SECRETARY OF STATE FOR ECONOMIC, BUSINESS AND AGRICULTURAL AFFAIRS, DEFENDANTS-CROSS APPELLANTS, AND NATIONAL FISHERIES INSTITUTE, INC., DEFENDANT-CROSS APPELLANT

Appeal No. 00-1569, 00-1581, 00-1582

(Decided March 21, 2002)

*Joshua R. Floum*, Legal Strategies Group, of Emeryville, California, argued for plaintiffs-appellants. With him on the brief was *Ariela F. St. Pierre*.

*M. Alice Thurston*, Attorney, Environment and Natural Resources Division, Appellate, Department of Justice, of Washington, DC, argued for defendants-cross appellants. With her on the brief were *John C. Cruden*, Deputy Assistant Attorney General; *Jane P. Davenport*, and *Ellen J. Durkee*, Attorneys, Wildlife & Marine Resources Section. Of counsel were *David M. Cohen*, Director; *Lucius B. Lau*, *Jeffrey C. Dobbins*, and *Jean E. Williams*, Attorneys; Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC. Also of counsel were *Anne V. Liu*, Attorney, National Oceanic & Atmosph. Administration; and *Virolanda Botet*, Attorney Advisor, Department of State; *Pamela B. Lawrence*, Attorney, Department of Commerce, of Washington, DC. *Eldon V.C. Greenberg*, Attorney, Garvey Schubert, of Washington, DC, for National Fisheries Institute, Inc.

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<sup>16</sup> To the extent that Congress intended to equate the publication instruction in § 1516a(e)(2) with the notice requirement of § 1504(d), it could have—as it did in 19 U.S.C. § 1675(a)(3)(C), requiring Commerce to publish the results of administrative reviews concerning entries whose liquidation is enjoined—mandated that Commerce publish “the final disposition and issue instructions to the Customs Service with respect to the liquidation of entries pursuant to the review.” However, instead of requiring the publication of liquidation instructions, thus potentially evincing an intent to effect notice of the suspension’s removal, section 1516a(e)(2) simply instructs Customs to publish notice of the court decision.

Appealed from: United States Court of International Trade  
*Judge* THOMAS J. AQUILINO, JR.

Before NEWMAN, CLEVINGER, and SCHALL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* CLEVINGER. Dissenting opinion filed by *Circuit Judge* NEWMAN.

CLEVINGER, *Circuit Judge*.

This case concerns the implementation of section 609(b) of Public Law 101-162, which prohibits the import of shrimp which have been harvested with fishing technology that may harm sea turtles. Despite having ruled that the government's regulations implementing section 609(b) were not in accordance with that statute, the Court of International Trade refused to enter an injunction directing the government to comply with the law. Plaintiffs, a coalition of environmental organizations and concerned citizens ("Turtle Island"), appeal the Court of International Trade's decision to withhold both an injunction and attorney fees under the Equal Access to Justice Act. Defendants, government officials charged with implementing section 609(b), cross-appeal the judgment of the Court of International Trade that their regulations violate the statute. We hold that the government's regulations are a permissible implementation of the statute and that Turtle Island is not entitled to injunctive relief or attorney fees.

#### BACKGROUND

Since 1987, United States regulations have required that shrimp trawlers generally install turtle excluder devices ("TEDs") when operating in United States waters where sea turtles are to be found. 50 C.F.R. §§ 223.206, 223.207 (2001). Shrimpers sweep many other denizens of the sea ("bycatch") into their nets when they trawl for shrimp. But unlike fish or shrimp, sea turtles are reptiles and must breathe air. While sea turtles can remain submerged for up to 90 minutes at a time, trawl nets typically are deployed for periods longer than 90 minutes before being hauled up. Sea turtles will drown if they are caught in shrimp nets and held underwater for long periods of time. When fitted into trawl nets, TEDs prevent sea turtles from being retained in the nets—typically by means of a metal grid barring entry to the closed end of the net. The grid bars are spaced so as to let shrimp pass through the grid into the closed end of the net, but the much larger sea turtles cannot pass through and are instead directed out an "escape hatch" above or below the grid.

The domestic shrimp industry strongly opposed the imposition of TED requirements in United States waters. *See, e.g., State of Louisiana, ex rel. Guste v. Verity*, 853 F.2d 322 (5th Cir. 1988). However, the case before us concerns not domestic regulations, but arises instead from nearly a decade's worth of litigation over the enforcement of a statute designed to impose TEDs on shrimping vessels of foreign nations: The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, Title VI,

§ 609, 103 Stat. 1037 (1989) (codified at 16 U.S.C. § 1537 note (2000)) ("section 609").

The full text of section 609 is as follows:

(a) The Secretary of State, in consultation with the Secretary of Commerce, shall, with respect to those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987—

(1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles;

(2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles;

(3) encourage such other agreements to promote the purposes of this section with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;

(4) initiate the amendment of any existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section; and

(5) provide to the Congress by not later than one year after the date of enactment of this section (Nov. 21, 1989)—

(A) a list of each nation which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles;

(B) a list of each nation which conducts commercial shrimp fishing operations which may affect adversely such species of sea turtles; and

(C) a full report on—

(i) the results of his efforts under this section; and

(ii) the status of measures taken by each nation listed pursuant to paragraph (A) or (B) to protect and conserve such sea turtles.

(b)(1) In General.—The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

(2) Certification Procedure.—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that—

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulato-

ry program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

Section 609 is divided into two parts, (a) and (b). Part (a) directs the Secretary of State to initiate international negotiations with the aim of protecting those species of sea turtles protected by the domestic TED requirements.<sup>1</sup> Part (b)(1) restricts the importation of shrimp which have been harvested in a manner that may endanger those species of sea turtles. Part (b)(2) establishes a certification procedure,<sup>2</sup> by which nations are exempted from the ban either if they have adopted regulatory measures reducing the incidental catch of sea turtles (e.g., a requirement that their shrimp fleets be equipped with TEDs), or if their operations do not pose any threat to sea turtles (e.g., no endangered turtles inhabit the waters fished by that nation).

This case requires us to decide whether section 609(b)(2)'s certification procedure is the only way a foreign nation may comply with section 609(b). Under the State Department's current regulations (*Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed. Reg. 36,946 (July 8, 1999) ("the 1999 Guidelines")), shrimp may be imported into the United States under one of two conditions. If the exporter attests that the nation in which the shrimp originated (that is, in whose waters the shrimp were harvested) has been certified under section 609(b)(2), the shrimp may be imported without further ado. Alternatively, if the country of origin has not been certified under section 609(b)(2), shrimp harvested in its waters may still enter the United States if both the exporter and an official of the harvesting nation attest that the individual shipment of shrimp in question was harvested under conditions that do not adversely affect sea turtles. Shipments meeting these conditions include those of aquaculture-grown shrimp, hand-caught shrimp, and shrimp harvested by vessels equipped with TEDs.<sup>3</sup> Thus, under the government's interpretation of section 609, a country may export shrimp to the United States either by requiring its entire fleet to be equipped with TEDs (and becoming certi-

<sup>1</sup> These species are the loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Eremochelys imbricata*).

<sup>2</sup> The President has delegated his authority to certifications under 609(b)(2) to the Secretary of State. *Delegation of Authority Regarding Certification of Countries Exporting Shrimp to the United States*, 56 Fed. Reg. 357 (Jan. 4, 1991).

<sup>3</sup> Each shipment must be accompanied by a "DSP-12" form, which attests either that the shipment was harvested in the waters of a certified country or that the shipment was harvested by one of the permissible methods.



fied under section 609(b)(2)), or by requiring TEDs only on those vessels catching shrimp destined for the United States market.<sup>4</sup>

Turtle Island interprets section 609 somewhat differently. Turtle Island believes that section 609 requires the government to prohibit the importation of all shrimp from uncertified countries. Under Turtle Island's interpretation of the statute, certification is the *only* way in which shrimp may be imported into the United States. In practice, this means that in countries where shrimp and endangered sea turtles frequent the same waters, all shrimping vessels must be equipped with TEDs if that country wishes to export shrimp to the United States.<sup>5</sup> Turtle Island argues that this interpretation is mandated by the plain language, intent, and legislative history of the statute.

The contest between Turtle Island and the government over the interpretation of section 609 has a long and tortured history, chiefly marked by the government's Protean efforts to escape the statutory interpretations being imposed upon it by the Court of International Trade. In the government's initial implementation of section 609 (the 1991 and 1993 Guidelines), the embargo was imposed only against shrimp from the Gulf of Mexico-Caribbean-Western Atlantic Ocean sea areas, harvests in those areas being the apparent focus of section 609 when the statute was enacted. See *Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 58 Fed. Reg. 9015 (Feb. 18, 1993); *Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines*, 56 Fed. Reg. 1051 (Jan. 10, 1991). But under the 1991 and 1993 Guidelines, national certification under section 609(b)(2) was the only way a harvesting nation could export shrimp to the United States. The import of shrimp from uncertified countries was prohibited, even if those particular shrimp had been caught using TEDs.

In 1992, the Earth Island Institute, a nonprofit environmental group and Turtle Island's immediate predecessor, filed suit against the government in the Northern District of California. Earth Island sought to force the government to initiate negotiation of international agreements for sea turtle conservation as demanded by section 609(a), and sought to force the government to apply the embargo against all shrimp-exporting countries, not just those of the wider Caribbean area. Earth Island was rebuffed on both fronts. The Ninth Circuit refused to enforce the negotiation directives of section 609(a), reasoning that since the power to negotiate with foreign nations was committed to the executive branch, enforcement of section 609(a) would violate the constitutional separation of powers. *Earth Island Inst. v. Christopher*, 6 F.3d 648, 653 (9th Cir. 1993). Furthermore, the Ninth Circuit ruled that because 28

<sup>4</sup> In practice, TED-equipped vessels and non-TED-equipped vessels do not seem to fish side by side in the waters of uncertified countries. Currently, uncertified countries that export shrimp to the United States enforce TED requirements on vessels plying certain fisheries but not in other fisheries. *Turtle Island Restoration Network v. Mallett*, 110 F. Supp. 2d 1005, 1011-13 (Ct. Int'l Trade 2000).

<sup>5</sup> Turtle Island apparently does not object to permitting import of aquacultured shrimp or hand-caught shrimp from uncertified countries.

U.S.C. § 1581(i) vests exclusive jurisdiction over embargoes and other trade restrictions in the Court of International Trade, an action to compel enforcement of the import prohibitions of section 609(b) could lie only with that court. *Id.* at 652.

Earth Island proceeded to refile its suit in the Court of International Trade, seeking to force the government to apply section 609(b)'s import restrictions worldwide, not just against shrimp harvested in the wider Caribbean region. The Court of International Trade agreed with Earth Island that the embargo should be applied across the board. The Court of International Trade also made clear its view that the government had limited enforcement of section 609(b) to the Caribbean region not because the government genuinely believed the statute to be so limited, but because of the economic and political fallout that would ensue from targeting countries outside the wider Caribbean. *See Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 576-77 (Ct. Int'l Trade 1995). Finding no geographical restrictions in the text of section 609, the Court of International Trade concluded that the government had not been properly enforcing section 609(b) and directed the government to prohibit the importation of shrimp—"wherever harvested in the wild"—that were harvested with commercial fishing technology that may adversely affect the species of sea turtles protected by section 609. *Id.* at 580.

In response to the Court of International Trade's decision (and following the Court of International Trade's refusal to grant a one-year extension of time for enforcement, *Earth Island Inst. v. Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1996)), the Department of State issued new regulations implementing section 609(b). *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 61 Fed. Reg. 17,342 (April 19, 1996). Complying with the Court of International Trade's order in *Earth Island*, the 1996 Guidelines restricted imports of shrimp harvested from all waters inhabited by sea turtles, not just those of the wider Caribbean region. However, in contrast to the 1991 and 1993 Guidelines, the 1996 Guidelines permitted imports of shrimp from waters of uncertified nations—so long as the exporter presented a declaration (the DSP-12 form) attesting that the shrimp accompanying the declaration were harvested under conditions that did not adversely affect the protected species of sea turtles. Thus, under the 1996 Guidelines, a nation did not need to be certified under section 609(b)(2) in order to export shrimp to the United States. Instead, a nation could comply with section 609 simply by employing TEDs on those vessels harvesting shrimp bound for the United States market.

Earth Island was less than pleased with the government's new interpretation of section 609. It filed with the Court of International Trade a "motion to enforce" the Court of International Trade's 1995 judgment, on the grounds that permitting import of TED-caught shrimp from uncertified nations would not conform with the Court of International

Trade's 1995 order directing the State Department to implement section 609 world-wide.

The Court of International Trade agreed with Earth Island that section 609(b)(1)'s embargo should be applied on a nation-by-nation basis, rather than on a shipment-by-shipment basis. The Court of International Trade's interpretation of section 609 rested on two grounds. First, the Court of International Trade refused to read the language of section 609(b)(1) in isolation. Reasoning that section 609(a) directed the Secretary of State to pursue negotiations with foreign nations, and that section 609(b)(2) required the President to determine whether a foreign nation's regulatory programs met United States standards for protection of sea turtles, the Court of International Trade concluded that section 609(b)(2) should be read *in pari materia* with the other sections of section 609. As such, the import restrictions of section 609(b)(2) should be applied nation-by-nation, and not shipment-by-shipment. *Earth Island Inst. v. Christopher*, 942 F. Supp. 597, 603-04 (Ct. Int'l Trade 1996).

The Court of International Trade's second rationale was based on its earlier conclusion that section 609 supplemented the Endangered Species Act ("ESA") and should also be read *in pari materia* with the ESA. *Earth Island Inst. v. Christopher*, 890 F. Supp. 1085, 1092 (Ct. Int'l Trade 1995). The Court of International Trade took from the ESA the principle that "the plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the costs." *Earth Island*, 942 F. Supp. at 606 (quoting *Earth Island*, 913 F. Supp. at 576, in turn quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978)). Accepting (in the absence of contrary evidence from the government) Earth Island's claim that the shipment-by-shipment approach would undermine the incentive for uncertified nations to become certified, the Court of International Trade agreed with Earth Island that the 1996 Guidelines would "eviscerat[e] the goal of Congress in enacting section 609." *Earth Island*, 942 F. Supp. at 604. Accordingly, the Court of International Trade prohibited the government from permitting the import of shrimp unless the harvesting nation had been certified under section 609(b)(2). *Id.* at 617.

There followed another ruling from the Court of International Trade, denying the government's request for a stay of enforcement but clarifying that the embargo did not apply to aquacultured shrimp or hand-caught shrimp, as these fishing technologies would not adversely affect sea turtles and were exempted from section 609 from the start. *Earth Island Inst. v. Christopher*, 948 F. Supp. 1062, 1069 (Ct. Int'l Trade 1996). However, Earth Island had sought to withdraw its "motion to enforce" shortly before the Court of International Trade issued its first ruling on the 1996 Guidelines, leaving only its request for attorney fees before the Court of International Trade. *Earth Island*, 942 F. Supp. at 602 n.7. The stated purpose of its attempted withdrawal was to preserve Earth Island's right to gather additional evidence and to challenge the

government's revised guidelines in a separate action.<sup>6</sup> *Id.*; *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1355 (Fed. Cir. 1998). The Court of International Trade denied Earth Island permission to withdraw, basing its refusal on the public interest at stake in proper enforcement of section 609. *Earth Island*, 942 F. Supp. at 602 n.7.

Upon the government's appeal to this court, we held that Earth Island "did not request permission to withdraw, but unilaterally and unconditionally withdrew its motion." *Earth Island*, 147 F.3d at 1356. We further held that Earth Island's unconditional withdrawal ended the controversy between the parties, thereby terminating the Court of International Trade's jurisdiction over the case except for the matter of attorney fees. *Id.* Accordingly, we vacated the Court of International Trade's orders that had directed the State Department to enforce section 609 on a nation-by-nation basis. *Id.* at 1358.

Meanwhile, during the period that the Court of International Trade had enjoined the government from permitting the import of TED-caught shrimp from uncertified nations, a group of such nations—India, Pakistan, Malaysia, and Thailand—brought a proceeding against the United States before the Dispute Settlement Body of the World Trade Organization ("WTO"), arguing that the enforcement of section 609 under the 1996 Guidelines violated certain provisions of the 1994 General Agreement on Tariffs and Trade ("GATT"). Ultimately, the WTO Appellate Body ruled that section 609 was a permissible conservation measure under GATT Article XX, but that the United States' enforcement of section 609 was discriminatory. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 1998 WL 720123 (Oct. 12, 1998). Specifically, the WTO pointed to the fact that shrimp caught using methods identical to those employed in the United States (*i.e.*, with TEDs) were embargoed solely because they were caught in the waters of uncertified countries. *Id.* at \*67. And while the statute itself might permit a flexible approach, the 1996 Guidelines demanded that a country adopt a regulatory regime identical to that of the United States as the only path to certification. *Id.* at \*46. Furthermore, the failure of the United States to initiate serious international negotiations to protect sea turtles (as demanded by section 609(a)) supported a finding of unjustifiable discrimination. *Id.* at \*51.

After this court vacated the Court of International Trade's injunction against the government, the State Department issued new Guidelines reinstating importation of shrimp from uncertified countries. *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 63 Fed. Reg. 46,094 (Aug. 28, 1998). Like the 1996 Guidelines, the 1998 Guidelines permitted import of shrimp from uncertified countries if the shipment was accompanied by a DSP-12 form attesting that the shrimp had been harvested by vessels equipped with TEDs. Its earlier

<sup>6</sup> Apparently, Earth Island lacked confidence that its challenge to the 1996 Guidelines could be resolved in its favor on the basis of the evidence in record. The decision of the Court of International Trade proved those fears groundless.

victory having been negated for lack of jurisdiction, Earth Island again filed suit challenging the new regulations in the Court of International Trade, which (not surprisingly) again found that importation of shrimp from uncertified countries violated the provisions of section 609(b). *Earth Island Inst. v. Daley*, 48 F. Supp. 2d 1064, 1081 (Ct. Int'l Trade 1999). Soon afterwards, the State Department issued its 1999 Guidelines. Designed to meet the WTO's objections, the 1999 Guidelines took a more flexible stance on which regulatory programs would merit national certification, but the 1999 Guidelines continued to permit importation of TED-caught shrimp from uncertified countries. Accordingly, the Court of International Trade yet again held that the shipment-by-shipment approach violated section 609 and entered a final declaratory judgment in favor of Turtle Island—which by now had been spun off as an independent entity from the Earth Island Institute. *Turtle Island Restoration Network v. Mallett*, 110 F. Supp. 2d 1005, 1018 (Ct. Int'l Trade 2000).

However, although the Court of International Trade concluded "without reservation that the plaintiffs have prevailed" in their argument that the importation of TED-caught shrimp from uncertified nations violated the terms of section 609, *id.*, the Court of International Trade denied Turtle Island injunctive relief. Moreover, the Court of International Trade refused to hold that the government's legal position was not substantially justified, barring Turtle Island from collecting attorney fees under the Equal Access to Justice Act. The Court of International Trade appeared to base these conclusions on the fact that of all the countries exporting shrimp to the United States, only Brazil and Australia were not certified, suggesting that relatively few sea turtles were being harmed in the waters of uncertified nations that served the United States shrimp market. *Id.* at 1011-12. Moreover, no nation that had previously established a nation-wide TED program had limited its regulatory program in favor of equipping only those vessels that served the United States market with TEDs. *Id.* at 1013. Given the absence of proof that shrimp trawling by uncertified nations was currently contributing significantly to sea turtle mortality, and in apparent recognition of the traditional reluctance of courts to intrude into matters of foreign relations, the Court of International Trade concluded, somewhat cryptically:

given the facts and circumstances of this case, which obviously transcend purely domestic concerns, this court is unable to conclude that the government's position currently is not substantially justified. \* \* \*

The court's inability means not only that plaintiff's application for any award of fees etc. cannot be granted, the motion for injunctive relief based upon the declaratory judgment in their favor must also be denied.

*Id.*

After the Court of International Trade issued its final judgment in *Turtle Island Restoration Network v. Mallett*, Malaysia renewed its chal-

lenge to the United States over enforcement of section 609 before a panel of the Dispute Settlement Body of the World Trade Organization. However, the panel ruled, and the Appellate Body affirmed, that the enforcement of section 609 under the State Department's 1999 Guidelines was justified under Article XX of GATT. These conclusions were based in part on the Court of International Trade's refusal to grant Turtle Island an injunction against the government, since under that ruling the United States continued to permit the import of TED-caught shrimp from uncertified countries. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 2001 WL 671012, at \*101 (Jun. 15, 2001). Moreover, the United States had initiated serious international negotiations for sea turtle protection, and now required nations to establish for certification a sea turtle program comparable in effectiveness to that of the United States—not necessarily one identical to that of the United States. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 2001 WL 126572, at \*38-49; \*51-54 (Oct. 22, 2001). Consequently, the enforcement of section 609 was ruled a permissible conservation measure and not discriminatory under Article XX of GATT.

Turtle Island now appeals the Court of International Trade's denial of an injunction and attorney fees. The government appeals the judgment of the Court of International Trade that the importation of TED-caught shrimp from uncertified countries as permitted by the 1999 Guidelines violates section 609. We exercise appellate jurisdiction over the final decision of the Court of International Trade under 28 U.S.C. § 1295(a)(5).

## I

We first consider whether the Court of International Trade reached the proper construction of section 609, as the propriety of the Court of International Trade's denial of injunctive relief and attorney fees will hinge on whether Turtle Island or the government has advocated the appropriate interpretation of the statute. We must therefore decide whether section 609(b)(1) of Pub. L. 101-162 prohibits importation of all shrimp or shrimp products from a country not certified under section 609(b)(2), or whether the government may permit the import of individual shipments from uncertified countries if exporters represent that those particular shipments were caught without the use of commercial fishing technology that may adversely affect those species of sea turtles protected by domestic law. Statutory interpretation is a matter of law that we review without deference to the interpretation reached by the Court of International Trade. *SKF USA Inc. v. United States*, 263 F.3d 1369, 1378 (Fed. Cir. 2001).

## A

We begin, as in all questions of statutory interpretation, with the plain words of the law, and in this case those words weigh heavily in the government's favor. The operative language of the embargo is found in



section (b)(1), which prohibits importation of shrimp, "which have been harvested with commercial fishing technology" that may harm sea turtles, except as provided in (b)(2). The clause "which have been harvested" modifies "shrimp." "Shrimp" are discrete objects, each of which has either been harvested with technology harmful to sea turtles or not. The statute distinguishes between the former shrimp, which are embargoed, and the latter shrimp, which are not. The plain language of the statute provides no basis for embargoing shipments of shrimp which have *not* been harvested with commercial fishing technology that may harm sea turtles. Because TED-caught shrimp have not been harvested with commercial fishing technology that may harm sea turtles, the statutory language does not support embargoing TED-caught shrimp from uncertified countries. Moreover, if certification under (b)(2) was the *only* way shrimp could be imported into the United States, then "which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles" in (b)(1) is largely superfluous language. We cannot see how the "harvested with commercial fishing technology" language could consistently be interpreted to permit import of some shrimp that have been harvested without adverse effect on sea turtles—such as aquacultured or hand-caught shrimp from uncertified countries—but to ban the import of other shrimp that have been harvested without adverse effect on sea turtles—such as TED-caught shrimp from uncertified countries.

Recognizing the primacy of the plain language in the hierarchy of statutory interpretation, Turtle Island tries to advance several arguments under that rubric. It argues that its interpretation is consistent with congressional intent, with other portions of the statute, and with the law's ultimate purpose—all of which might be true but none of which states an argument based on the plain language of the statute. Turtle Island cannot escape the fact that it seeks to interpolate words into the plain language of the statute, reading 609(b)(1) as an embargo on "shrimp which have been harvested *from a nation that employs* commercial fishing technology which may affect adversely said species of sea turtles." While the text might not absolutely bar such an interpolation, this interpretation does not comport with the most direct reading of the law's words.

In any event, we do not find persuasive the argument based on conformity with the remaining sections of section 609. Turtle Island points to section 609(a), which directs the Secretary of State to negotiate with foreign *nations* to protect sea turtles, and to section 609(b)(2), which establishes a procedure for *nations* to be certified as exempt from the embargo of section 609(b)(1). The Court of International Trade drew from this structure the conclusion that, reading those sections of the law *in pari materia* with the embargo provisions, the embargo provisions must refer to other nations, and not to individual shipments of shrimp. *Earth Island*, 942 F. Supp. at 603–604. We cannot agree with this reasoning. The fact that other portions of the statute direct the Secretary of

State to negotiate with and certify nations does not demand that the Secretary apply the embargo to entire nations as well. One negotiates with nations and imports shrimp, not vice versa. Congress drafted sections 609(a) and 609(b)(2) to refer to nations because the negotiation and certification provisions could not have been drafted in any other way—not because Congress made a conscious choice to focus them on nations rather than shipments. An embargo provision, on the other hand, might be drafted either to apply to shipments or to nations, and we do not think Congress was foreclosed from embargoing individual shipments of shrimp simply because it included the embargo provisions in a law that also speaks of nations. We find nothing inherently insensible about applying the negotiation and certification provisions to nations on the one hand, and the embargo provisions to particular shipments of shrimp on the other.

## B

Both sides also lay claim to the legislative history of section 609. The State Department finds some congressional intent to delegate the definition of which shrimp should be embargoed, while Turtle Island finds both the nation-by-nation principle and the conclusion that section 609's principal goal is the protection of endangered sea turtle species worldwide. We cannot find support for the State Department's position. While Congress may have intended the administering agency to define which methods of harvesting shrimp may adversely affect sea turtles, we find no intent to delegate the power to define the scope of the embargo itself. But our disagreement with Turtle Island's view of the legislative history is more profound and more damaging to its case. For we find nothing in the legislative history to mandate a nation-by-nation approach, and we find little, if any, indication that minimizing sea turtle drownings was Congress's main concern when it enacted section 609.

The extant legislative history of section 609 consists mostly of speeches on the Senate floor. Turtle Island emphasizes portions of this record in which Senators speak of "other nations" and "countries" to support its position that section 609(b)(1) was intended to operate nation-by-nation. We are not inclined to assign much weight to these excerpts. Although the Senators spoke more in terms of nations than of shipments or vessels, their usage was not consistent. For example, Appropriation Chairman Hollings described the provision when brought to the Senate floor as:

It calls for a ban on *imports of shrimp from any nation* that: First, fails to adopt a regulatory program for turtle protection which is comparable to that of the United States; and second, has higher incidental catches of sea turtles than U.S. shrimpers.

135 Cong. Rec. 22,493-94 (1989) (emphasis added), but described the final version after conference with the House as follows:

At the request of the House managers we approved an addition on the ban on *imported shrimp not harvested by vessels using TED's*

shall not apply [sic] if the "particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting."

135 Cong. Rec. 26,613 (1989) (emphasis added). The relevant provisions of the bill had not changed; Senator Hollings's shift simply indicates how loosely Senators described the bill. Given the imprecision and informality of the floor comments, we are loath to assemble congressional intent from such scraps of casual word choice.

Furthermore, most of the comments marshaled by Turtle Island do not reflect the Senate's interpretation of the embargo provisions of section 609(b)(1), because those comments were made in support of a bill that lacked any embargo provisions at all. As first introduced by Senator Breaux, "Amendment No. 365" included *only* the provisions now appearing as 609(a), requiring the Secretary to initiate negotiations for international sea turtle conservation and to report on other nations' efforts to protect sea turtles. *See* 135 Cong. Rec. 15,508 (1989). Apparently, an earlier measure had included some kind of embargo, but that measure was never brought to the floor because the Senate Finance Committee feared that such an embargo might violate the GATT. *See id.* at 15,509 (statements of Sens. Bentsen and Lott). The floor statements in support of the original bill refer to "other nations" and "countries" because international negotiations were the sole focus of the original bill. While the supporters of the original bill clearly hoped to induce foreign nations to adopt TED requirements, we cannot derive from their description of the negotiation provisions a nation-by-nation approach to the embargo.

The original "Amendment No. 365" was not brought to a vote, but soon resurfaced as a measure including the embargo provisions of 609(b) as well as the negotiation provisions of 609(a). We have no indication why the new embargo provisions did not provoke concerns about GATT violations. But what is unmistakably clear from the discussion on the Senate floor is that the primary purpose of the bill was to protect the domestic shrimping industry, and not the sea turtle. The advocates of the bill were Senators from Gulf states who had long opposed the domestic TED regulations because they believed that TEDs reduced shrimp catches. *See* 135 Cong. Rec. 22,554-55 (1989) (statements of Sens. Johnston and Breaux). The Senators who spoke in favor (none spoke against) feared that American shrimpers would be at a disadvantage competing in the domestic market with foreign shrimpers, who were not burdened with TED regulations. By imposing TED requirements on foreign shrimpers exporting to the United States, the sponsors of section 609 hoped to provide American shrimpers with a level playing field. Senator Shelby's comments in support of the original version of the bill (lacking the embargo provisions) explain this reasoning well:

Shrimpers are having numerous problems in using the TED's. It is my understanding that the Gulf of Mexico has been overwhelmed with seagrass in recent months causing the clogging of the openings

of the TED's. Consequently, shrimpers are losing considerable amounts of their catch, which translates into reductions in income. There has been little evidence to date to indicate that the use of TED's will significantly affect the survival rate of sea turtles. \* \* \* The U.S. shrimp industry is being treated unfairly in being asked to risk economic ruin while others are not required to do similarly. The burden of saving the sea turtles should be shared equally. \* \* \* In addition, other countries have extensive commercial shrimp operations that are not subjected to turtle conservation. This places our shrimp industry in a noncompetitive situation because these countries still share the lucrative U.S. market with our domestic shrimpers. Our domestic shrimpers must have a level playing field.

135 Cong. Rec. 15,511 (1989).

Similar arguments were advanced by Senators Bentsen, *id.* at 15,509, Lott, *id.* at 15,509-10, Breaux, *id.* at 15,508-09, and Johnston, 135 Cong. Rec. 22,554 (1989). Each expressed his concern that the domestic shrimp industry was threatened because U.S. shrimpers, bearing the alleged increased costs of TEDs, would have to compete with foreign shrimpers not so burdened. By requiring or encouraging other nations to catch shrimp bound for the United States market with TEDs, imported shrimp would cost more and be less competitive with domestic shrimp. Alternatively, if foreign shrimp was embargoed, the price of shrimp would rise, also benefiting the domestic shrimp industry. *Id.* (statement of Sen. Johnston).

Thus, to the extent legislative history is available, we find that Congress with remarkable unanimity was focused on protecting the domestic shrimp industry, not the sea turtle, when it enacted section 609. Many of the comments made on the Senate floor reflected deep skepticism about the effectiveness of TED requirements, and about the wisdom of placing sea turtle conservation above the economic well-being of domestic shrimpers. We therefore cannot agree with Turtle Island that the fidelity of the government's implementation of section 609 should be measured solely by how effectively the measures protect endangered sea turtles.

Nor can we agree with Turtle Island that requiring foreign nations to install TEDs on vessels not serving the United States market would advance Congress's aim of achieving parity for the domestic shrimp industry. Congress did not seem to foresee that a nation might equip vessels serving the United States market with TEDs but forego TEDs on its other vessels. Turtle Island argues that requiring such nations to equip their entire fleets with TEDs would benefit the United States shrimp industry, because it would place domestic shrimpers exporting shrimp to overseas markets on an equal footing with foreign shrimpers exporting shrimp to the same markets. But coursing through the legislative history is an unswerving focus on the United States market, not overseas markets. There is no indication from the legislative history, and no evidence in the record, that domestic shrimpers compete in foreign markets.

Whether or not Congress was correct that the domestic TED requirements handicapped domestic shrimpers, Congress was concerned with the effects of TEDs on the United States market alone. Congress enacted a measure applicable to only those sea turtles encountered by American shrimpers,<sup>7</sup> and Congress enacted the embargo to protect what it saw as unfair competition in the American market. As such, Congress was concerned with those foreign vessels harvesting shrimp for the United States market, not foreign vessels harvesting shrimp for foreign markets. We find Congress's intent met by the State Department's current system of enforcing section 609(b), which regulates all imports of shrimp into the United States market. The contemporary legislative history provides no basis for extending section 609(b)'s reach in an attempt to control how shrimp bound for foreign markets are harvested.

## C

We find further indication that section 609(b)(1) refers to shipments, not nations, when we compare it to similar statutes.<sup>8</sup> Congress has drafted other statutes with explicit nation-by-nation embargoes, but did not do so in the case of section 609(b). Congress has enacted nation-by-nation embargoes triggered by foreign restrictions on fishing rights of U.S. vessels:

the Secretary of the Treasury shall immediately take such action as may be necessary and appropriate to prohibit the importation into the United States \* \* \* fish or fish products, *from any fishery of the foreign nation concerned*, which the Secretary of State finds to be appropriate \* \* \*.

16 U.S.C. § 1825(b)(2) (2000) (emphasis added); by nations conducting large-scale driftnet fishing outside their exclusive economic zones:

The President \* \* \* shall direct the Secretary of the Treasury to prohibit the importation into the United States of *fish and fish products* \* \* \* *from that nation*.

16 U.S.C. § 1826a(b)(3)(A) (2000) (emphasis added); and by fishing operations or other trade threatening endangered species:

the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of *any products from the offending country* for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization \* \* \*.

22 U.S.C. § 1978(a)(4) (Supp. V 1999) (emphasis added).

When Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate. *See, e.g., I.N.S. v. Phinpathya*, 464 U.S. 183, 190 (1984). In very similar instances, Con-

<sup>7</sup> Section 609(a) specifies "those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987"—that is, the domestic TED regulations.

<sup>8</sup> We note in passing that section 609(b)(1) seems clearly patterned after the text of the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(a)(2), as that statute stood when section 609 was enacted in 1989. However, neither party submitted an argument in their briefs based on this resemblance.

gress has explicitly embargoed *all* imports from the offending nation, regardless of whether any particular shipment was taken in a manner that would threaten endangered species. The fact that Congress declined to include such language in section 609(b) suggests that Congress did not intend to impose a similar embargo there.

#### D

Turtle Island also argues that allowing an exporting nation to equip only those vessels serving the United States market will undo the ends of section 609, since those turtles escaping from the TED-equipped trawl nets "inevitably will die" in the nets of other vessels trawling the same waters that are not equipped with TEDs. As we state above, section 609 was not enacted with the primary goal of minimizing sea turtle deaths. But as a matter of pure logic, we cannot agree with Turtle Island's predictions. Assuming sea turtles obey the laws of terrestrial probability, then a fleet partially equipped with TEDs will kill fewer sea turtles than a comparable fleet without any TEDs (so long as there are a finite number of trawling vessels and some sea turtles survive<sup>9</sup>). A fleet fully equipped with TEDs would likely save more turtles, but equipping only a portion of a fleet with TEDs is not entirely futile. Moreover, if Turtle Island's view is correct, then permitting the import of aquacultured or hand-caught shrimp from uncertified nations may also frustrate the purpose of section 609—because nations may export such shrimp to the United States but still harvest shrimp bound for other markets with trawl nets lacking TEDs.

Turtle Island also argues that permitting uncertified nations to export shrimp to the United States will lower the incentive for uncertified nations to become certified. But even if we thought that Turtle Island's approach would encourage more nations to enact certification programs, or save more sea turtles, we cannot give weight to such considerations if the will of Congress is dispositive. To quote Turtle Island's own argument, a court's "individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress" simply is not relevant; "[o]nce the meaning of an enactment is discerned \* \* \* the judicial process comes to an end." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Because we find that the combination of plain language, legislative history, and comparison with other statutory provisions decisively establishes the meaning of section 609(b), we need not consider more attenuated arguments on the wisdom of the government's implementation of section 609.

Likewise, because the meaning of section 609 is clear, we need not reach the question of how much deference we ought to accord the State Department's interpretation of section 609, or whether the State Department's interpretation would minimize potential conflicts with international trade agreements. "If the intent of Congress is clear, that is

<sup>9</sup> If the depredations of that portion of the fleet not equipped with TEDs were so great as to drown all the turtles in the area, then both fleets would drown the same number of turtles—that is, all of them. However, not even Turtle Island makes such an allegation.



the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). The intent of Congress is clear and the government's current implementation of section 609(b) carries out that intent.

#### CONCLUSION

However much we may respect Turtle Island's long struggle on behalf of the Earth's endangered sea turtles, we cannot find that Congress shared Turtle Island's current position when it enacted section 609 of Pub. L. 101-162. Having concluded that the State Department's interpretation of section 609 is the correct one, we must also hold both that Turtle Island is not entitled to an injunction, and that the government's legal position was substantially justified within the meaning of the Equal Access to Justice Act. We therefore reverse the Court of International Trade's judgment that the government's decision to permit the importation of TED-caught shrimp from uncertified nations is not in accordance with section 609(b) of Pub. L. 101-162, and affirm the Court of International Trade's denial of injunctive relief and attorney fees.

#### COSTS

No costs.

#### REVERSED-IN-PART AND AFFIRMED-IN-PART

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NEWMAN, *Circuit Judge*, dissenting.

I respectfully dissent, for the majority's decision negates the statutory method of protecting endangered sea turtles. The Court of International Trade applied the statute in accordance with its terms. Whatever the political or diplomatic considerations, neither the executive agency charged with administering the statute, nor this court, has authority to depart from the statute as enacted.

The Court of International Trade held that the State Department's 1998 Revised Guidelines<sup>1</sup> are not consistent with the authorizing statute, section 609 of Public Law 101-162, enacted in 1989 for the protection of endangered sea turtles. The relevant statutory provisions are:

**§609(b)(1) In general.**—The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

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<sup>1</sup> Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46094 (Aug. 28, 1998). The plaintiffs challenged the 1998 Guidelines, now superseded by the 1999 Guidelines, which do not differ as to the point here at issue. Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36946 (July 8, 1999).

**§609(b)(2) Certification procedure.**—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that—

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

16 U.S.C. §1537 note.

The Court of International Trade held that section 609 prohibits the importation into the United States of shrimp from countries that do not require their shrimp trawls to protect sea turtles to at least the same extent as is required of United States shrimp vessels. The State Department's 1991 guidelines initially interpreted the statute in accordance with this meaning and in compliance with section 609(b), but limited enforcement and potential certification to fourteen Caribbean countries. However, various environmental groups were concerned at the State Department's limitation to Caribbean countries, and in 1994 the plaintiffs sued for broader enforcement of section 609. In 1995 the Court of International Trade held that the statute was not limited to the Caribbean area. *Earth Island Inst. v. Christopher*, 913 F. Supp. 559 (Ct. Int'l Trade 1995). Eleven Caribbean countries had been certified at the time of this ruling.

In 1996 the State Department changed its interpretation of section 609, apparently in response to trade-related objections. The Department issued new Guidelines, and no longer required that all of a nation's shrimp trawlers meet standards at least as rigorous as those imposed on shrimpers in United States waters. The 1996 Guidelines instead adopted shipment-by-shipment certification, which required only that the particular shrimp imported into the United States were harvested by a ship fitted with turtle exclusion devices (TEDs). Such shrimp could be imported, whether or not any other ship in the nation's shrimp fleet used turtle-protective devices. During this period four countries in Central America received full certification, as well as nations that harvest only cold water shrimp (beyond the range of sea turtles), and nations that use aquaculture or hand (artisanal) shrimp fishing methods.

In response to the 1996 Guidelines, the plaintiffs who had prevailed in 1995 filed a "motion to enforce" the Court of International Trade's judgment, challenging the shipment-by-shipment approach as contrary to section 609. The Court of International Trade agreed with the plaintiffs

and enjoined the government from importing any shrimp or products from shrimp harvested in the wild by vessels of uncertified nations. *Earth Island Inst. v. Christopher*, 942 F. Supp. 597 (Ct. Int'l Trade 1996). International pressures increased at this time, including complaints that this interpretation of section 609 was in violation of the General Agreement on Tariffs and Trade (GATT). In 1998 this court reversed the injunction, finding that the Court of International Trade lacked jurisdiction to rule on the motion to enforce because the plaintiffs had withdrawn the motion. *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1356 (Fed. Cir. 1998). Following this court's decision, the State Department issued the 1998 Guidelines, reinstating the shipment-by-shipment approach; these are the guidelines at issue in this case.

The Court of International Trade in April 1999 again held that the State Department's interpretation of section 609 was incorrect. The court held that section 609(b)(2) limits section 609(b)(1) to shrimp from countries that meet the certification requirements of section 609(b)(2). The court explained that the statute requires country certification, not shipment-by-shipment certification as to the particular load of shrimp:

[P]aragraph (1) of section 609(b) is specifically contingent upon the certification procedure established by section 609(b)(2), which offers the only congressionally-approved breaches of the embargo

\* \* \*

*Earth Island Inst. v. Daley*, 48 F. Supp.2d 1064, 1081 (Ct. Int'l Trade 1999). The court further reasoned that:

Paragraphs (b)(1) and (b)(2) are *pari materia*; they cannot be read independently, or out of the context adopted by Congress, including section 609(a) [instructing negotiations to protect sea turtles worldwide], to slow or stanch the extinction of species of sea turtles.

*Id.*

The issue is whether, contrary to this decision of the Court of International Trade, the State Department correctly interpreted section 609 as requiring no more than that the particular shipment to the United States was harvested using a TED. My colleagues on this panel so hold. However, neither the statutory text, its legislative purpose, its enactment history, nor its contemporaneous interpretation, supports this meaning.

### *The Legislative Purpose*

It is not disputed that sea turtles are endangered by commercial trawl shrimping.<sup>2</sup> The decline in sea turtle populations throughout the world has been dramatic; for example, as of 1990 the Kemp's ridley turtle population had declined to less than one percent of its abundance in 1947. See *Decline of the Sea Turtles: Causes and Prevention*, 26 National Academy of Sciences 144 (1990). The acknowledged principal cause of sea

<sup>2</sup> Five sea turtle species are listed as endangered or threatened: the loggerhead (*Caretta caretta*), Kemp's ridley (*Leptochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*).

turtle deaths is capture and drowning in shrimp trawl nets. In 1987 the National Marine Fisheries Service estimated that 11,179 sea turtles were killed in southeastern United States waters each year. United States trawlers harvest eight percent of the world's supply of shrimp. Sea turtles, however, roam in warm waters worldwide, and are endangered worldwide. Globally, it was estimated that 124,000 turtles were killed each year by commercial shrimp trawlers. See *Earth Island*, 913 F. Supp. at 568.

On this background, section 609 was enacted. The statute requires nations that wish to serve the United States market to adopt turtle-protective measures no less rigorous than those imposed on our own fleet; all trawl shrimpers in United States waters are required to use turtle exclusion devices. It is generally accepted that when some trawlers use turtle exclusion devices and others do not, the turtles escaped or excluded from the nets of one trawler are often caught by trawlers without TEDs. However, if all vessels in harvest areas use turtle exclusion devices, it is estimated that the devices release "97 percent of the turtles caught in shrimp trawls." *Sea Turtle Conservation; Shrimp Trawling Requirements*, 52 Fed. Reg. 24244, 24244 (June 29, 1987). These data led to the legislation as enacted, requiring that other countries, if their shrimpers wish to sell into the United States market, protect the turtles to the same extent as required for United States vessels. At the time of enactment it was well recognized that the purpose of the legislation was to protect sea turtles in their global habitat, while assuring that United States fishermen were not competitively disadvantaged. Both goals are served by the statute's requirement that nations whose shrimp fishers wish to sell to the United States must adopt fleet-wide turtle-protection devices, and not simply place such devices on selected ships. The Report of the Senate Committee on Appropriations explained the legislation as follows:

It calls for a ban on imports of shrimp from any nation that: (1) fails to adopt a regulatory program for turtle protection which is comparable to that of the United States; and (2) has higher incidental catches of sea turtles than U.S. shrimpers.

S. Rep. No. 101-144, at 104 (1989). Similarly, after the Conference addition of section 609(b)(2)(C) providing that certification may be based on turtle-free shrimp fishing environments, the Conference Report of the House of Representatives explained the legislation as requiring

a ban on importation of shrimp which have been harvested with commercial fishing technology which may adversely affect species of sea turtles subject to the regulations, not later than May 1, 1991, unless the President certifies to Congress that *the harvesting nation has adopted regulations governing the incidental taking of sea turtles in the course of shrimp harvesting comparable to regulations adopted by the U.S.*, that the average rate of the incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by U.S. vessels in the course of such harvesting or the particular fishing environment of the har-

vesting nation does not pose a threat of the incidental taking of sea turtles in the course of such harvesting.

H.R. Conf. Rep. No. 101-299, at 84 (1989) (emphasis added). Neither of the legislative Reports indicates that Congress intended to adopt or accept merely a shipment-by-shipment approach to importation of shrimp.

The legislative record illustrates the congressional purpose of protecting these endangered animals worldwide, while avoiding any disadvantage to domestic shrimp fishing interests due to their obligatory use of TEDs.<sup>3</sup> The sponsor of section 609, Senator Breaux, explained:

[T]he amendment I am offering today is intended to promote the international conservation of sea turtles, and to provide the groundwork for ensuring that foreign fishing interests bear as great a conservation burden as our own industry.

135 Cong. Rec. S8335, 8373-74 (daily ed. July 20, 1989). Senator Breaux further stated:

[T]his amendment focuses on the role that other nations must play if we are to fulfill our goal of effective sea turtle conservation.

*Id.* at 8374. Senator Chafee also explained that the legislation serves to strengthen our Nation's commitment to protect endangered sea turtles from drowning in commercial shrimp nets.

*Id.* at 8375. Senator Johnston also recognized that the legislation would create

an effective protection first for sea turtles, and alternatively help for the price of shrimp for our shrimpers in Louisiana.

135 Cong. Rec. S12191, 12266 (daily ed. Sept. 29, 1989). Senator Johnston explained the commercial benefits as follows:

What it will mean in practical terms, we think, if those countries do not take that action [to place TEDs on all vessels] the price of shrimp obviously will go up because the supply will be down, so that Louisiana shrimpers, Texas shrimpers, Florida shrimpers will in effect have some form of compensation in the form of higher prices for their shrimp should these countries fail to take that action.

*Id.* Senator Lott reiterated the idea that the legislation would make sure that the other countries are taking the same measures we are. We cannot have a situation where we impose requirements on our shrimpers that other countries do not have and then allow them to use the opportunity to export a flood of shrimp into our country to fill a void that may be left.

135 Cong. Rec. S8335, 8374. Senator Shelby described the conservation programs of other nations as a condition of access to the United States market:

<sup>3</sup> At the time of enactment the concern was not the cost of a TED, which was as low as \$200, but the possible reduction of the catch. The record states that experience has shown no significant reduction in catch, and indeed some ancillary advantages such as exclusion of debris and unwanted fish.

If other countries are to share in the benefits of access to the \$20 million U.S. market, I believe that these countries should be required to implement conservation programs comparable to that of the United States.

*Id.* at 8376.

There were no statements, during the extensive floor discussion, contrary to the uniform goal of protecting endangered sea turtles and avoiding disadvantage to United States shrimpers. A shipment-by-shipment approach not only weakens the incentive for countries to impose TED requirements, but it removes the anticipated "level playing field" for domestic interests, for all United States shrimpers are required to use TEDs. That the legislation was designed for country-by-country certification, not shipment-by-shipment, was reiterated by Senator Breaux:

It is patently unfair on its face to say to the U.S. industry that you must abide by these sets of rules and regulations, but other countries do not have to do anything, and, yet, we will then give them our market. That is exactly what is happening. I think the amendment \* \* \* is a good amendment. It will require other countries to do exactly what we are being required to do, and if in fact they do not, they will lose the U.S. market.

135 Cong. Rec. S12191, 12266. Senator Hollings made a similar statement in describing the legislation:

It calls for a ban on imports of shrimp from any nation that: First, fails to adopt a regulatory program for turtle protection which is comparable to that of the United States, and second, has higher incidental catches of sea turtles than U.S. shrimpers.

*Id.* at 12207.

Senator Hollings, after the Conference with the House, explained the addition of section 609(b)(2)(C), that a country will be certified and its shrimp imports permitted when the "particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting." 135 Cong. Rec. S14389, 14391 (daily ed. Oct. 31, 1989). This amendment clarified that the ban on importation does not apply when a nation's shrimp are grown in aquaculture, or caught by hand line (artisanal) fishing, or by trawling in cold water that is not turtle habitat. This clause did not, however, authorize or accept the use of trawl methods that do not exclude the turtles. There is no support at all for the government's theory that section 609(b)(2)(C) adjusted the legislative purpose and permitted use of shrimp fishing technology that "may affect adversely such species of sea turtles" as long as the turtle-destroying shrimp catch is not sent to the United States market.<sup>4</sup>

<sup>4</sup> The panel majority states that it cannot see any difference between aquacultured or hand-caught shrimp and TED-caught shrimp. Aquacultured shrimp are farmed rather than caught in the open sea, with no risk to sea turtles. And hand caught shrimp do not pose a serious threat to sea turtles because of the short duration of tow times. See *Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 58 Fed. Reg. 9015, 9016 (Feb. 18, 1993). By contrast, mechanized commercial shrimp trawling constitutes a considerable threat to sea turtles, a threat that is not relieved when only some of the trawlers use TEDs.



Since United States shrimpers produce only eight percent of the world's shrimp catch, sea turtle protection was recognized as requiring a global effort. Although the panel majority's theory that "section 609 was not enacted with the primary goal of minimizing sea turtle deaths" is not supported by the legislative record, the alternative legislative goal of protecting the domestic industry is also disserved by permitting importation from nations whose other vessels do not carry turtle-exclusion devices. In addition, I do not agree with the majority that if there is a commercial aspect to legislation, the humanitarian purpose becomes irrelevant.

### *The Guidelines*

For the first six years after enactment, the State Department interpreted section 609 as requiring an embargo of all shrimp from a nation that harvests shrimp in turtle habitat with at least some trawlers that do not use turtle exclusion devices. This interpretation was changed in the 1996 Guidelines. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

It cannot be disputed that when only some of the ships trawling for shrimp use TEDs, sea turtles that are saved by the TEDs may later be captured by the vessels without TEDs. The Commerce Department itself raised this concern. Rolland Schmitten, Fisheries Administrator for the National Marine Fisheries Service, wrote as follows:

By requiring that TEDs be used only on those vessels that harvest shrimp for export to the U.S. market, sea turtles will be put at greater risk of incidental capture aboard non-TED equipped boats in a nation's fleet.

This approach will also reduce the incentive for nations to adopt comprehensive national programs to reduce the incidental take of sea turtles \* \* \* [and] may also result in some certified nations abandoning the comprehensive programs they now have in place or curtailing enforcement of such programs.

Letter from R. Schmitten to Mary Beth West, Deputy Assistant Secretary of State for Oceans (July 28, 1998).

Although the government argues that the State Department has discretion to interpret the statute, citing *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), in that case the Court held that the discretion exercised by the Secretary of Commerce for phased-in compliance with the national whale quota was "a reasonable construction of the language used in [the legislation]." *Id.* at 232. Here, the State Department's interpretation is not a reasonable construction of the statute, which clearly requires country-by-country, not shipment-by-shipment, certification. An agency's statutory interpretation cannot stand if it contravenes the clearly expressed legislative intent. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,

842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Board of Governors of Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986).

In its brief, the Secretary of State suggests that matters of international relations and trade pressures in the World Trade Organization (WTO) have warranted more circumspect handling than section 609 may have originally contemplated. The government also states that global turtle protection is proceeding, albeit slowly. However, this court is not authorized to evaluate a pragmatic political accommodation. We, like the Executive branch, are bound by the law as Congress enacted it.

#### *The World Trade Organization Litigation*

The government makes much of the recent resolution of the challenge to section 609 in the WTO. In 1996 Malaysia, Thailand, India, and Pakistan challenged the United States' implementation of section 609 as contrary to the GATT. The WTO Appellate Body held that this statute was within an exception to GATT rules in that it related to conservation, but held that various aspects of the certification guidelines were discriminatory. Eventually, in 2001, on a second suit brought by Malaysia, the State Department's 1999 Guidelines (which authorize shipment-by-shipment certification) were accepted as in harmony with the GATT.

The government states that the WTO rulings "support" the State Department's interpretation. The government describes these WTO rulings as "the law of nations" and states that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). However, no party asserts that WTO decisions have controlling status as United States law. The Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreement Acts states that decisions of WTO panels and the WTO Appellate Body "have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy." H.R. Doc. No. 103-316, at 1032 (1994). The SAA also states:

If a [WTO] report recommends that the United States change federal law to bring it into conformity with a Uruguay Round Agreement [including the GATT], it is for the Congress to decide whether any such change will be made.

*Id.* The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. §3512(d); see also 19 U.S.C. §3512(a)(1) ("No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.").

Thus although the government appears to rely on the WTO ruling as requiring United States (and judicial) support of the current Guide-

lines, neither we nor the State Department has authority to rewrite the statute. See *Suramerica de Aleaciones Laminadas C.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992) ("if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy"); *Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1366 (5th Cir. 1993) (the court must "give effect to Congress' intent, even if implementation of that intent is virtually certain to create a violation of the GATT").

I repeat, it is not before us to decide whether the State Department has pursued a path that is diplomatically preferable to that selected by the Congress. The government brief states that an increasing number of nations are requiring the use of TEDs for all their trawled shrimp. These salutary developments do not relieve the judicial obligation to implement the statutory text as Congress intended and enacted it. Thus I must, respectfully, dissent from the court's incorrect statutory interpretation.

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NOVOSTEEL SA, PLAINTIFF-APPELLANT v. UNITED STATES, DEFENDANT-APPELLEE, AND BETHLEHEM STEEL CORP AND U.S. STEEL GROUP, A UNIT OF USX CORP (NOW KNOWN AS UNITED STATES STEEL LLC), DEFENDANTS-APPELLEES

Appeal No. 01-1274

(Decided March 26, 2002)

*Pamela L. St. Peter*, Edmund Maciorowski, P.C., of Bloomfield Hills, Michigan, argued for plaintiff-appellant. With her on the brief was *Edmund Maciorowski*.

*Mark L. Josephs*, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. On the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director; and *Velta A. Melnbrensis*, Assistant Director. Of counsel was *A. David Lafer*, Senior Trial Counsel. Of counsel on the brief were *John D. McInerney*, Chief Counsel for Import Administration; *Berniece A. Browne*, Senior Counsel; and *David W. Richardson*, Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, of Washington, DC.

*Jennifer Danner Riccardi*, Dewey Ballentine LLP, of Washington, DC, argued for defendants-appellees. With her on the brief were *Michael Stein*, *Bradford L. Ward*, and *Jon Avins*. Of counsel were *Rory F. Quirk*, and *Navin Joneja*.

Appeal from: United States Court of International Trade  
Chief Judge GREGORY W. CARMAN

Before MICHEL, LOURIE and DYK, Circuit Judges.

Opinion for the court filed by Circuit Judge MICHEL. Opinion dissenting in part filed by Circuit Judge DYK.

MICHEL, Circuit Judge.

Plaintiff-Appellant Novosteel SA appeals a decision by the United States Court of International Trade holding that antidumping and

countervailing duty orders addressed to "cut-to-length carbon steel plate from Germany" applied to the steel "profile slabs" that Novosteel was importing from a German company called Reiner Brach. *Novosteel SA v. United States*, 128 F. Supp. 2d 720, 722 (Ct. Int'l Trade 2001). Specifically, the court determined that substantial evidence supported the scope determination by the Commerce Department that the two orders, as well as the initial sources of evidence used to interpret them (*i.e.*, the petitions for the orders and the initial determinations by Commerce and the International Trade Commission), did not unambiguously include or exclude the profile slab at issue. As a result, the court said, Commerce properly resorted to the five-part "*Diversified Products*" criteria to clarify the orders' scope. And the application of those criteria, the court concluded, showed that these two orders did indeed cover the Reiner Brach profile slab.

We affirm the judgment of the Court of International Trade. First, contrary to Novosteel's suggestions, the petitions that led to the issuance of the orders did not need to specifically identify the Reiner Brach profile slab in order to cover them; our precedent, to say nothing of the regulations, makes clear that neither a petition nor an antidumping or countervailing duty order requires that level of specificity. Similarly, the fact that neither the petitions nor the orders (called the "Plate Orders") listed the specific "HTSUS" (Harmonized Tariff Schedule of the United States) number assigned to the Reiner Brach profile slab does not mean that the Orders also unambiguously excluded this product. As a matter of law, a petition need not list the entire universe of products or the numbers assigned to them under the HTSUS in order to cover those products. And the petitions here, as more fully explained below, described the products covered by the Orders using "dimensional" criteria and other definitions; they did not define the scope of the requested Orders in terms of the HTSUS and thus did not purposefully limit themselves to the HTSUS products that the petitions did list. And so, the omission of the HTSUS number for Reiner Brach profile slab does not mean that the Orders necessarily excluded that product.

Next, we discern no reversible error with the definition that the court assigned to a disputed term ("flat-rolled") in the Orders. Novosteel, simply put, has not explained how the court's definition differs in any material respect from the definition that Novosteel asserts the court should have used—the HTSUS definition of "flat-rolled." Meanwhile, nothing in an earlier scope determination, *see Wirth Ltd. v. United States*, 5 F. Supp. 2d 968 (Ct. Int'l Trade 1998), indicates that the Commerce Department had to apply a certain meaning to the terms "flat-rolled" or "further worked" so that they could encompass only a set type, number and order of steel-production processes. And substantial evidence—including a brochure that the German exporter (Reiner Brach) used to describe its profile slabs—supports the finding that Reiner Brach could have had additional treatment or processes performed on its steel profile slab, *i.e.*, that it was possibly having this steel "further worked"

within the meaning of the Orders, thereby justifying resort to the *Diversified Products* criteria. Last, by not raising an argument about the retroactive application of a scope determination until it filed its summary judgment reply brief, Novosteel has waived the right to have us address that argument in the first instance.

#### BACKGROUND

This case presents the question whether two related antidumping and countervailing duty orders addressed to a type of steel imported from Germany covered the steel "profile slab" that Plaintiff-Appellant Novosteel had imported for approximately four years.

##### A. THE PLATE ORDERS ISSUE IN 1993.

In the early 1990s, Bethlehem Steel and the other Defendant-Intervenors in this case filed petitions with officials of the Commerce Department asking that they investigate and issue antidumping and countervailing duty orders against certain cut-to-length steel imported into the United States from Germany. As with all such petitions filed with Commerce, Bethlehem Steel and the other domestic steel producers alleged that companies were importing and selling steel from Germany below cost and were thereby causing "material harm" to domestic steel sellers.

In their petitions, the Defendant-Intervenors did not specifically identify "profile slab," much less the profile slab exported by the German company Reiner Brach, as a product that fell within the scope of its petitions. In the section entitled "Scope of Investigation and Description of the Merchandise," the petitions instead refer to the dimensional characteristics of the steel covered by the requested Orders, as well as to definitions from the "American Iron and Steel Institute product categories" and the "American Society for Testing and Materials standards specification numbers." On one page, the petitions also refer to and quote (in a footnote) the definition of "flat-rolled products" according to the Harmonized Tariff Schedule of the United States. (J.A. 88 n.5) (quoting HTSUS, Chapter 72, Note 1(k)). Generally, however, the six pages devoted to the respective petitions' "description of merchandise" define the type of steel at issue with little reference to the HTSUS.

On the last page of this section, the petitions do list certain products according to the HTSUS classification numbers that the Customs Service had assigned to them. As the petitions themselves stated, products with these HTSUS numbers were "covered by [these] Petition[s]." The classification number "HTSUS 7207"—the number later assigned to Novosteel's imported profile slab—does not appear among them.

In August 1993, the Commerce Department, having investigated the Defendant-Intervenors' petitions, went ahead and issued both antidumping and countervailing duty orders directed to the importation of

"cut-to-length carbon steel plate from Germany." The two orders, called the "Plate Orders," defined the products that they covered as:

Certain hot-rolled carbon steel *flat-rolled products* in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness \* \* \*.

58 Fed. Reg. 43,756, 43,758 (Aug. 17, 1993); 58 Fed. Reg. 44,170 (Aug. 19, 1993) (emphasis added). As with the earlier petitions, the Plate Orders did not list HTSUS 7207 as one of the products that they covered. The Orders did state, however, that the listing of classification numbers did not alone determine whether any particular product fell within their scope: "Although the Harmonized Tariff Schedule of the United States \* \* \* subheadings are provided for convenience and customs purposes, our written descriptions of the scope of these proceedings are dispositive." *Id.* (emphasis added).

#### B. NOVOSTEEL IMPORTS

##### REINER BRACH PROFILE SLAB FROM 1994 TO 1998.

In June 1994, Novosteel (through its wholly owned subsidiary Barza-lex) began importing into the United States a type of steel called "profile slab" from Reiner Brach GmbH & Co. A few months earlier, Novosteel had obtained a ruling letter from the Customs Service that classified this profile slab under the "heading 7207, HTSUS." The heading signified that, in the view of the Customs Service, the profile slab constituted an "unfinished product of iron or non-alloy steel." In addition, because the 1993 Plate Orders did not specifically list HTSUS 7207, Customs did not require Novosteel to pay estimated antidumping or countervailing duties on this product at the time of entry. Novosteel proceeded to import Reiner Brach's profile slab for the next four years without having to pay any estimated import duties.

In June 1998, however, Customs officials informed Novosteel that a review of its import record showed that the Reiner Brach profile slab did indeed fall within the scope of the Plate Orders. Novosteel stopped importing the Reiner Brach profile slab in July 1998, though it "effectuated 14 entries" of this product between August 1998 and February 1999. Also in August 1998, Novosteel followed the advice given by Customs officials and requested a scope determination by the Commerce Department about whether the Plate Orders did indeed cover the Reiner Brach profile slab it was importing. *See* 19 C.F.R. § 351.225(c) (setting forth the procedures for obtaining a determination about the scope of an antidumping or countervailing duty order).

#### C. THE COMMERCE DEPARTMENT CONCLUDES THAT THE REINER BRACH PROFILE SLAB FALLS WITHIN THE SCOPE OF THE PLATE ORDERS.

In March 1999, Commerce issued its initial scope determination, finding that the Plate Orders did appear to cover the Reiner Brach profile



slab. After the parties filed additional comments, Commerce concluded in May 1999 that, "based upon a review of the underlying record," the profile slab here did indeed constitute the kind of carbon steel covered by the Plate Orders. In so concluding, however, Commerce reasoned that neither the petitions' descriptions of the merchandise nor the initial investigations by Commerce and the International Trade Commission conclusively showed whether the Plate Orders applied here. Instead, said Commerce, its conclusion about whether the profile slabs were "flat-rolled" within the meaning of the Plate Orders rested on the application of the five-part *Diversified Products* criteria. See 19 C.F.R. § 351.225(k)(2) (1998) (setting forth criteria used to determine whether a particular product is covered by an antidumping or countervailing duty order when an examination of the petition, and the initial investigation and determinations of Commerce and the International Trade Commission "are not dispositive"); *Diversified Prods. Corp. v. United States*, 572 F.Supp. 883 (Ct. Int'l Trade 1983) (establishing the criteria mentioned above).

#### D. THE COURT OF INTERNATIONAL TRADE AFFIRMS.

Novosteel thereafter filed a complaint with the Court of International Trade challenging the rulings of the Commerce Department as unsupported by substantial evidence. Relying on the agency record compiled before Commerce, Novosteel then moved for summary judgment. See U.S. CIT R. 56.2.

In a thorough opinion, the Court of International Trade upheld Commerce's scope determination, denied Novosteel's summary judgment motion and entered judgment for the government. In particular, the court concluded that Commerce did properly resort to the *Diversified Products* analysis because, first, a review of the petitions and initial investigations did indeed fail to clarify whether the term "flat-rolled," as used in the Plate Orders, unambiguously included or excluded the Reiner Brach profile slab. Citing precedent, the court added that simply because the Orders did not explicitly identify the Reiner Brach profile slab itself did not mean that the Orders had also unambiguously excluded that product. *Novosteel*, 128 F. Supp. 2d at 726.

In a similar vein, the court rejected Novosteel's assertion that because the Plate Orders did not list HTSUS 7202 (the HTSUS number that Customs assigned to Reiner Brach profile slab) and because the "[p]etitioners described the merchandise included within the order[s] \* \* \* within the context of HTS[US] nomenclature," that omission, too, showed that the Orders unambiguously excluded the profile slab. *Id.* at 727 (quoting Novosteel's Summ. J. Br. at 7). According to the court, the petitions instead defined the covered merchandise by using criteria that had nothing to do with the HTSUS, including (for example) criteria relating to "dimensional measurements" and to definitions from the "American Iron and Steel Institute product categories" and the "American Society for Testing and Materials standards specification numbers." *Id.*

And while the petitions also described the subject merchandise by referring to HTSUS classification headings, the court discounted this HTSUS reference as simply a requirement of the regulations. *See id.*; *see also* 19 C.F.R. § 351.202(b)(5) (setting forth requirements for petitions that request the imposition of antidumping or countervailing duties, including requirement that a petition list "the subject merchandise \* \* \* and its current U.S. tariff classification number"). In other words, the court implied that the regulations neither set forth a requirement that a petitioner list every single HTSUS classification number that a putative order might cover, nor define the terms it uses in a petition by reference to the HTSUS. *See Novosteel*, 128 F. Supp. 2d at 727-28. Commerce, moreover, stated in the Plate Orders themselves that it was providing these HTSUS headings "for convenience and customs purposes"; the written descriptions of the merchandise still controlled the scope of the Orders. *Id.* at 727.

The court proceeded to examine the definition of the subject merchandise that Commerce did ascribe to the Plate Orders. Specifically, the court agreed that the operative term used in the Plate Orders was "flat rolled" and that the petitions did define that term by reference to the HTSUS. The HTSUS, Note 1(k), in turn defines "flat-rolled" as "rolled products \* \* \* which do not conform to the definition at [Note] 1(ij)." *Novosteel*, 128 F. Supp. 2d at 728 (emphasis added). HTSUS, Note 1(ij) sets forth a definition of "semi-finished products," saying it refers to products that "have not been further worked [other] than subjected to primary hot-rolling \* \* \*." *Id.* (emphasis added). By implication, then, the HTSUS definition of "flat-rolled" referred to products that have been "further worked [beyond] \* \* \* primary hot-rolling." *Id.*

The court then noted, however, that it was rejecting the argument that this HTSUS definition alone controlled the meaning of "flat-rolled," as the Plate Orders themselves used the term "flat-rolled" (not "further worked"). Instead, the court indicated that it would simply consider this HTSUS definition as one of the factors that would help clarify the meaning of that term. *Id.* at 728-29. Further, because neither party offered an unambiguous definition of "further worked," *see id.* at 729, the court relied on a common dictionary definition of the term "further worked," just as it had done in another case involving the "further worked" language. *Id.* (citing *Winter-Wolff v. United States*, 996 F. Supp. 1258, 1265 (Ct. Int'l Trade 1998)). Ultimately, then, the court defined "further worked" as meaning to "subject an existing product to some process of development, treatment or manufacture beyond primary hot-rolling." *Id.*

Given that definition, the court next held that "[f]ive pieces of evidence" supported Commerce's finding that Reiner Brach profile slab could have possibly undergone some additional process or treatment, i.e., could have been "further worked," and that a final determination about the Orders' coverage thus required application of the *Diversified Products* criteria. *Id.* at 729-32. Most prominently, the sales brochure

that Reiner Brach distributed to U.S. customers indicated as follows: that the company intended to use its profile slabs "to augment the shrinking supply of very expensive thick plate [i.e., flat-rolled steel] on the world steel markets," (J.A. 758); that Reiner Brach "has, over the years, worked closely with its liquid steel producers to melt cleaner and better steel," (*id.*); that it uses "[u]ltrasonic testing \* \* \* manually on each finished slab to provide [Reiner Brach's] customers with internal integrity assurance," (*id.*); and that it uses a "hydraulic press as well as a five roll flattening machine" to guarantee "[f]latness within close tolerances," (J.A. 759) (emphasis added). In addition, Novosteel's brief evidently admitted that Reiner Brach had its steel profile slab produced at a "facility 'commonly described as a two high reversing mill,'" a mill used to manufacture the type of plate or flat-rolled steel covered by the Plate Orders. *Novosteel*, 128 F. Supp. 2d at 729 (quoting Pl.'s Br. at 3).

After concluding that this evidence supported Commerce's finding that the Plate Orders did not unambiguously include or exclude this product, the court then applied the *Diversified Products* criteria to the other relevant evidence, *e.g.*, a survey about the tolerances for Reiner Brach profile slab, various responses by Novosteel to Commerce's questionnaires, a specification guide showing that one could have the profile slab substituted for plate steel in certain applications, excerpts from a treatise, documents and other evidence indicating that Reiner Brach had changed its name and had attempted to sell profile slabs to its existing customers for cut-to-length plate, the information contained in Reiner Brach's sales brochure, etc. *Id.* at 732-38. In the end, the court determined that the Plate Orders did apply to the Reiner Brach profile slab. Nothing in the court's opinion addresses the issue whether Novosteel should have to pay the estimated antidumping duties for the profile slab it imported for four years without penalty, *i.e.*, whether imposition of duty payments for those years would have an impermissible retroactive effect. Novosteel, however, did not present this argument in its summary judgment briefing until it filed its reply brief.

#### E. NOVOSTEEL'S ARGUMENTS ON APPEAL.

Reduced to its essentials, Novosteel's appeal appears to present six issues for our consideration. First, Novosteel seems to suggest that because the Plate Orders did not specifically identify Reiner Brach profile slab, the Commerce Department and the Court of International Trade strayed beyond a "bright line" by construing the Orders so that they did encompass its steel profile slab. Second, we alternatively construe Novosteel's broad argument here to mean that, because the Orders speak in terms of the HTSUS and because those Orders also failed to list the HTSUS number for the Reiner Brach profile slab (HTSUS 7207), they must also unambiguously exclude this HTSUS number (and, of course, the profile slab covered by that HTSUS number). Third, Novosteel intimates that Commerce erred by not adopting the HTSUS definition of "flat-rolled," though it has not explained why this HTSUS definition

differs in any significant way from the definition actually used by Commerce and the court.

Fourth, in Novosteel's view, Commerce and the court erred because they deviated from a definition of "further worked" that Commerce had rendered in another scope determination without offering any reasons for that deviation. Fifth, pointing to the agency record generally and the Reiner Brach brochure specifically, Novosteel suggests that substantial evidence does not support Commerce's scope determination because the brochure cited by the agency and the court showed only a "capability" of having the steel profile slab "flat-rolled"; no evidence, according to Novosteel, shows that Reiner Brach actually went about exercising this capability. Last, Novosteel presents the same argument that it did not raise with the Court of International Trade until it filed its summary judgment reply brief; namely, that Commerce was impermissibly applying its scope determination to more than four years' worth of imports of Reiner Brach profile slab. We address each of these arguments in turn.

#### DISCUSSION

In so doing, we use the same standard of review that the Court of International Trade uses when reviewing scope determinations by the Commerce Department: whether substantial evidence supports Commerce's determination and whether that determination accords with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997); *Nitta Indus. Corp. v. United States*, 997 F.2d 1459, 1460 (Fed. Cir. 1993). Substantial evidence consists of evidence that a "reasonable mind might accept as adequate to support a conclusion." *Gerald Metals, Inc.*, 132 F.3d at 720. In addition, we also give "due respect" to the "informed opinion of the Court of International Trade." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994). Applying this deferential standard of review, we affirm the court's judgment.

#### *A. The Petition for the Plate Orders Did Not Unambiguously Exclude the Profile Slab.*

To begin with, the description of the merchandise contained in the petitions does not show that the Plate Orders unambiguously excluded the Reiner Brach profile slab, contrary to Novosteel's assertion. The "Commerce Department enjoys substantial freedom to interpret and clarify its antidumping orders. But while it may interpret those orders, it may not change them." *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995); accord *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990).

The applicable regulations explain how Commerce will determine "whether a particular product is included within the scope of an [anti-dumping or countervailing duty] order." 19 C.F.R. § 351.225(k). First, Commerce will examine the "descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary [of Commerce] and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1). Note that, in setting forth the "descriptions of

the merchandise contained" in its petition, *see id.*, a petitioner (like Bethlehem Steel) need not "circumscribe the entire universe of articles" that might possibly fall within the order it seeks. *Nitta Indus.*, 997 F.2d at 1464; *accord Wirth*, 5 F. Supp. 2d at 976 (stating that the "absence of a reference to a particular product in the Petition does not necessarily indicate that the product is not subject to an order") (citation omitted). Indeed, the regulations themselves recognize that Commerce must conduct scope determinations in the first place because the "descriptions of the subject merchandise \* \* \* must be written in *general terms*." 19 C.F.R. § 351.225(a) (emphasis added).

Second, if a review of these initial criteria does not definitively resolve whether an order covers a particular product, Commerce must then consider the five *Diversified Products* criteria. These criteria consist of the "physical characteristics of the [subject] product," the "expectations of the ultimate purchasers," the "ultimate use of the product," the "channels of trade in which the product is sold," and the "manner in which the product is advertised and displayed." 19 C.F.R. §§ 351.225(k)(2)(i)-(v).

In this case, no language in the petitions unambiguously excludes the Reiner Brach profile slab from the scope of the Plate Orders. Indeed, as the Court of International Trade noted, the Orders did expressly list some of the products not covered by the Orders; but Reiner Brach profile slab was not among them. Nor has Novosteel identified any language in any of the sources (the petitions and the initial determinations by Commerce and the ITC) used to initially construe those Orders that would exclude its imported product. In short, then, Novosteel's first argument seems to rely on a proposition that Commerce (via regulation) and the courts have roundly rejected—the proposition that a petition must expressly and specifically identify all the products covered by the order at issue. *See* 19 C.F.R. § 351.225(a); *Nitta Indus.*; *Wirth*, *supra*. For these reasons, we reject it here as well.

#### *B. Antidumping/Countervailing Duty Orders and the HTSUS.*

Liberalizing construing Novosteel's argument about the allegedly unambiguous scope of the Orders, we also conclude that the petitions' omission of the HTSUS number assigned to Reiner Brach profile slab does not strengthen Novosteel's appeal. As stated above, Novosteel claimed before the Court of International Trade that the petitions requesting the Plate Orders spoke of the relevant steel product in "HTSUS nomenclature"; and thus, the argument goes, the listings of the HTSUS classification numbers in the petitions actually defined the entire realm of products covered by the Plate Orders.

This argument fails for several reasons. For one thing, as the Court of International Trade explained, the petitions hardly defined the scope of the products in terms of the HTSUS; rather, they described the products covered by the Orders using "dimensional" criteria and references to non-HTSUS sources, *e.g.*, definitions from the "American Iron and Steel Institute" and the "American Society for Testing and Materials," in addition to references to the HTSUS. The HTSUS references, in other

words, by no means dominated the petition so as to make that petition synonymous with the HTSUS listings themselves. The Plate Orders themselves make this point clear, saying that they were providing the HTSUS listings for "convenience and customs purposes" only and that the petitions' description of the merchandise still controlled the Orders' scope.

Our precedent has likewise indicated, meanwhile, that a reference to an HTSUS number "is not dispositive" about the scope of an antidumping or countervailing-duty order. See *Smith Corona*, 915 F.2d at 687. So too has the precedent from the Court of International Trade. See *Wirth*, 5 F. Supp. 2d at 977-78 ("The inclusion of various HTSUS headings in a petition ordinarily should not be interpreted to exclude merchandise \* \* \* classified under an HTSUS heading not listed in the petition."), *aff'd*, 185 F.3d 882 (Fed. Cir. Feb. 2, 1999) (Table). We have no reason to now cast aside those precedents as something less than controlling in this case.

At the same time, we recognize that one of the applicable regulations does state that petitions must contain (among other things) a "detailed description of the subject merchandise that defines the requested scope of the investigation, including \* \* \* its current U.S. tariff classification number." 19 C.F.R. § 351.202(b)(5) (emphasis added). But as the Court of International Trade also implied, that regulation does not in turn say that the failure to include a particular HTSUS number within a petition means the resulting Order will likewise exclude the product that is designated under that particular HTSUS classification number. Compare *Wirth*, 5 F. Supp. 2d at 977 (rejecting argument that the regulations required a dispositive listing of all HTSUS numbers and concluding that the HTSUS list alone did not constitute the entirety of products covered by the petition or the order that followed). More important, Novosteel has not challenged the court's implicit interpretation of the regulation as either erroneous or as somehow offending (or exceeding) the statute from which it derives. We see no reason to make the argument for them. Further, we doubt that any argument to that effect would survive close scrutiny, given again that the regulations also contemplate the need to draft the scope of these orders "in general terms." See 19 C.F.R. § 351.225(a).

*C. The Court's Definition of "Flat-Rolled" versus the HTSUS Definition of "Flat-Rolled."*

We need not comment on whether Commerce or the court used the proper methodology to arrive at a definition for "flat-rolled," the operative term at issue, or whether they should have relied solely on the HTSUS definition of that term. Even assuming that Novosteel has squarely presented this question for our review, it has nevertheless failed to explain how the HTSUS definition of "flat-rolled" differs in any material respect from the "flat-rolled" definition actually used by the court.



As noted in the court's opinion, HTSUS defines "flat-rolled" by contrasting it with another definition ("semi-finished"); thus, "flat-rolled" means products that are *not* "other products of a solid section, which have not been further worked [other] than subjected to primary hot-rolling \* \* \*." *Novosteel*, 128 F. Supp. 2d at 728 (citations omitted) (emphasis added). Stated differently, HTSUS defines "flat-rolled" to refer to products that, in addition to "primary hot-rolling," have also been "further worked." The Court of International Trade, meanwhile, ultimately defined "flat-rolled" as meaning to "subject an existing product to some process of development, treatment or manufacture beyond primary hot-rolling."

As we see it, this definition looks every bit the same as the HTSUS definition. *Novosteel* has not even compared these two definitions, much less explained why they differ and why that difference should change the judgment of the court and the Commerce Department. At most, then, the ruling of the court here, even assuming it is error, amounts to nothing more than harmless error, *see* U.S. CIT R. 61.

*D. Nothing in the Wirth Decision Purports to Control the Definition of "Further Worked" (or "Flat-Rolled").*

The Court of International Trade has held that Commerce must either act in accord with its prior, similar scope determinations or else provide "rational reasons for deviating" from them. *Springwater Cookie & Confections, Inc. v. United States*, 20 CIT 1192, 1196 (Ct. Int'l Trade 1996). Citing this principle, *Novosteel* asserts that Commerce (and the court) erred because Commerce had allegedly defined "further worked" in another, similar scope determination (*see Wirth*) so that that term encompassed only a distinct set of steel-making processes; and that, in this case, Commerce disregarded the definition in *Wirth* without explaining why.

For purposes of this appeal, we assume without holding that the controlling principle is the principle laid down in *Springwater Cookie*. But as the Court of International Trade here reasoned, nothing in either its *Wirth* decision or in the underlying *Wirth* scope determination suggests that Commerce could assign only one meaning to the term "further worked" or, more important, to the term actually used in the Plate Orders, "flat-rolled," so as to limit those terms to a distinct and ordered set of processes only. Accordingly, while the scope determination in *Wirth* and the scope determination here share some similarities, *e.g.*, *Wirth* addressed the applicability of antidumping orders directed to cut-to-length carbon steel plate from Brazil, none of those similarities compels a contrary conclusion about the definition of "further worked," "flat-rolled" or the processes that they could and could not include.

*E. The Reiner Brach Sales Brochure.*

Given our deferential standard of review, we also uphold Commerce's finding that Reiner Brach could possibly have had additional treatment done on its profile slabs so as to have that steel product "flat-rolled," *i.e.*, "further worked." As noted, the Court of International Trade and Com-

merce both largely based this finding on the brochure that Reiner Brach had admittedly circulated to its U.S. customers. This finding, moreover, led Commerce and the court to conclude that an examination of the initial criteria (the petitions and the initial investigations by Commerce and the ITC) did not definitively resolve whether the Plate Orders included or excluded this particular product; and thus, that application of the *Diversified Products* criteria was necessary.

Mindful of the low threshold needed to show that Commerce here justifiably found an ambiguity, we agree that Reiner Brach's sales brochure, along with the admission that Reiner Brach produces its steel at a "two high reversing mill," provide the requisite substantial evidence. Most significant, the brochure states that Reiner Brach guarantees its steel meets strict "flatness \* \* \* tolerances" and that a "hydraulic press as well as five roll flattening machine are employed to back up this guaranty." (J.A. 759) (emphasis added). These statements alone could lead one to reasonably infer that, indeed, Reiner Brach uses equipment to produce "flat-rolled" steel, *i.e.*, steel that it had "further worked" beyond the hot-rolling process.

As if to strengthen that point, the brochure adds that the profile slab "augment[s] the shrinking supply of \* \* \* thick plate"—*i.e.*, flat-rolled steel—in the world. And that Reiner Brach undertakes certain processes in order to produce "very thick profiling slabs of superior internal integrity," as shown by the "ultrasonic testing \* \* \* performed manually on each finished slab to provide our customers with internal integrity assurance." Reasonably construed, a fact finder could read these other statements to confirm that Reiner Brach may indeed have undertaken processes to help refine and test its steel (*i.e.*, to "further work" its steel) and to thereby produce "profiling slabs of superior internal integrity." This inference is further bolstered by the admission that Novosteel apparently made in its brief about Reiner Brach having its profile slab produced at a "two high reversing mill," a mill that is capable of producing the type of steel covered by the Plate Orders.

In a sense, a short brochure might seem like a slender reed on which to base a scope determination, especially one in which the appellate record alone includes more than 1300 pages. After all, one might think that the government or the Defendant-Intervenors could have had an expert (or several experts) examine one of Reiner Brach's profile slabs and determine one way or the other whether the steel exhibited signs of additional treatment or processes beyond primary hot rolling. Or that an expert could have examined other evidence, like the Reiner Brach brochure, and concluded that the statements in that brochure showed that the steel profile slab was "flat-rolled" within the technical meaning of that term.

But the final scope determination here did not actually turn on this brochure; the Commerce Department and the Court of International Trade instead considered the brochure's statements for the limited purpose of determining whether the Orders unambiguously included or ex-

cluded the Reiner Brach profile slab, thereby necessitating resort to the *Diversified Products* criteria and the record evidence addressed to those criteria, e.g., a survey about the tolerances for Reiner Brach profile slab, the various admissions, answers to questionnaires and other information provided by Novosteel itself, a specification guide and treatise, as well as the information contained in Reiner Brach's sales brochure, etc. (Novosteel, unsurprisingly, does not challenge the court's thorough analysis under these latter criteria.) Further, other reasonable fact finders might just as well consider this brochure the proverbial smoking gun, an admission that Reiner Brach produces the very kind of "flat-rolled" steel covered by the Plate Orders.

In any event, our court of course plays a limited role in reviewing determinations by the Commerce Department. And so, even assuming we might find differently if we had to make these findings in the first instance, we obviously have no authority to do so now. See *Gerald Metals, Inc.*, 132 F.3d at 719-20 (reiterating the substantial-evidence standard of review as whether a reasonable mind might accept the evidence in the record as sufficient to support a conclusion). Nor do we think it necessary (or even justifiable) to scrutinize the record for other evidentiary arguments that Novosteel could have squarely presented but nevertheless did not, e.g., that the "flatness" or the "five roll flattening machine" referred to in the Reiner Brach brochure means something different than the "flat-rolled" used in the Orders themselves. In the end, therefore, we cannot conclude that the brochure here constitutes something less than substantial evidence. Thus, we affirm the judgment with respect to this ruling, too.

*F. Waiver and the Retroactive Imposition of Antidumping Duties.*

The last issue raised by Novosteel is whether Commerce could retroactively apply the Plate Orders, as construed in its scope determination, to the profile slab that Novosteel had imported for four years without paying estimated duties. Novosteel, however, failed to preserve this issue for our review, for it waived this retroactivity argument by not presenting it in the principal summary judgment brief filed with the Court of International Trade. See *Viskase Corp. v. Am. Nat'l Can Co.*, 261 F.3d 1316, 1326, 59 USPQ2d 1823, 1830 (Fed. Cir. 2001) (noting that appellate courts "only rarely" will entertain "evidence and issues \* \* \* not properly raised in proceedings below"). Raising the issue for the first time in a reply brief does not suffice; reply briefs *reply* to arguments made in the response brief—they do not provide the moving party with a new opportunity to present yet another issue for the court's consideration. Further, the non-moving party ordinarily has no right to respond to the reply brief, at least not until oral argument. As a matter of litigation fairness and procedure, then, we must treat this argument as waived.

Novosteel, understandably enough, has tried its best to circumvent waiver, saying that it raised the question (as indeed it did) before the Commerce Department and that it alluded to the retroactivity argu-

ment in the complaint filed with the Court of International Trade (though only the most strained reading of the complaint would justify that latter assertion). But the sources it cites are irrelevant for waiver purposes. A party does not preserve or waive an issue based on the arguments it presented to an administrative agency; a party merely exhausts that issue before the agency so as to give a court the proper basis to review that issue on appeal or via a complaint. *See, e.g., Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998). Similarly, a party does not waive an argument based on what appears in its pleading; a party waives arguments based on what appears in its brief.

So, given that Novosteel did not present its retroactivity argument to the Court of International Trade until after it had filed its principal summary judgment brief, and given that parties must give a trial court a fair opportunity to rule on an issue other than by raising that issue for the first time in a reply brief, we conclude that Novosteel has indeed waived this argument for purposes of our review.

#### CONCLUSION

For the reasons stated above, the judgment of the Court of International Trade is

#### AFFIRMED.

United States Court of Appeals for the Federal Circuit

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DYK, *Circuit Judge*, dissenting in part.

The appellant's briefs are virtually awash in frivolous or unmeritorious arguments, which are properly rejected by the majority. However, I fear that the appellant's single meritorious argument has been lost in the shuffle.

On appeal to this court, the Department of Commerce ("Commerce") does not claim that the product is clearly within the 1993 antidumping and countervailing duty orders ("Plate Orders"); it asserts only that the Plate Orders are ambiguous, making resort to the *Diversified Products* criteria appropriate. The appellant disagrees, urging that the Plate Orders are not ambiguous and that its products are not within the scope of the Plate Orders. In my view, the disagreement here is not about the scope of the Plate Orders. Rather, Commerce has simply failed to make the necessary factual investigation to determine whether the product is within the agreed scope of the Plate Orders. In my view, the majority errs in concluding that the ambiguity in the Plate Orders is established by ambiguity in the present record. I do not think that the inadequacy in the present record makes the Plate Orders ambiguous.

#### I

Our decisions with respect to scope orders have established three propositions: (1) that Commerce has discretion to interpret its scope or-

ders, see *Ericsson GE Mobile Communications, Inc v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995); (2) that Commerce cannot construe its scope orders to include products that are outside those orders, see *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990); and (3) that if a scope order is ambiguous, Commerce can resort to the *Diversified Products* criteria to determine whether the product is within the order, see *id.*

All parties appear to assume that the relevant question under the Plate Orders here is whether appellant's product is "flat-rolled" within the meaning of the Orders, 58 Fed. Reg. 43,756 (Aug. 17, 1993); 58 Fed. Reg. 44,170 (Aug. 19, 1993), and that "flat-rolled" is properly construed by reference to Harmonized Tariff Schedule of the United States ("HTSUS"), Chapter 72, Note 1(k), which in turn refers to HTSUS, Chapter 72, Note 1(ij).<sup>1</sup> Thus, the parties assume that the question of whether appellant's product was "flat-rolled" depends on whether appellant's product was "further worked." I also agree that the Court of International Trade properly defined "further worked" as "to subject an existing product to some process of development, treatment, or manufacture beyond primary hot-rolling." *Novosteel SA v. United States*, 128 F. Supp. 2d 720, 729 (Ct. Int'l Trade 2001) (citing *Winter-Wolff, Inc. v. United States*, 996 F. Supp. 1258, 1265 (Ct. Int'l Trade 1998)).

## II

Commerce's conclusion as to whether the products were "further worked" was far from clear. In the *Preliminary Scope Determination*, Commerce stated that "it is not clear whether the Reiner Brach profile slabs qualify as flat-rolled products covered by the Plate Orders. To answer this question, we examined the *Diversified Products* criteria enumerated in section 351.225(k)(2)." *Preliminary Scope Determination Regarding Profile Slabs—Antidumping and Countervailing Duty Orders on Certain Cut-to-Length Carbon Steel Plate from Germany*, U.S. Department of Commerce Internal Memorandum from Roland MacDonald to Joseph Spetrini, at 5 (March 23, 1999) ("*Preliminary Scope Determination*"). However, in the *Final Scope Determination* under review, Commerce concluded that "record evidence indicates that Reiner Brach profile slabs are indeed further processed, and thus do not fall within the definition of excluded products at Note 1(ij) \* \* \*." *Final Scope Determination Regarding Profile Slabs—Antidumping and Countervailing Duty Orders on Certain Cut-to-Length Carbon Steel Plate from Germany*, U.S. Department of Commerce Internal Memorandum from Roland MacDonald to Joseph Spetrini, at 4 (May 18, 1999) ("*Final Scope Determination*").

<sup>1</sup> Note 1(k) defined "flat-rolled" as "rolled products \* \* \* that do not conform to the definition at [Note] 1(ij)." Note 1(ij) defined "semi-finished products" as products that "have not been further worked [other] than subjected to primary hot-rolling \* \* \*." In light of the parties' agreement, I do not reach the question of whether the use of the definition of "flat-rolled" provided in the notes is appropriate.

Apart from evidence that Novosteel was able to manufacture its profile slabs within close flatness tolerances, the evidence of "further working" was (1) Reiner Brach's sales brochure, which explicitly stated that "[a] hydraulic press as well as a five roll flattening machine are employed to back up this guaranty" of "[f]latness within close tolerances;" and (2) ultrasonic testing which suggested that its profile slabs were sold as finished products. See *Final Scope Determination* at 7-8. At oral argument in this court, the government did not rely on the flatness tolerances as showing "further working" and conceded that the ultrasonic testing (item 2) itself did not constitute "further working." With respect to the hydraulic press and the five-roll flattening machine (item 1), Commerce urged at oral argument that these machines showed the "capab[ility]" to engage in "further working."

### III

There is no substantial evidence in this record to support a finding that the appellant's product was "further worked." The majority appears to agree, stating:

In a sense, a short brochure might seem like a *slender reed* on which to base a scope determination, especially one in which the appellate record alone includes more than 1300 pages. After all, one might think that the government or the Defendant-Intervenors *could have had an expert* (or several experts) examine one of Reiner Brach's profile slabs and determine one way or the other whether the steel exhibited signs of additional treatment or processes beyond primary hot rolling. Or that *an expert could have examined other evidence*, like the Reiner Brach brochure, and concluded that the statements in that brochure showed that the steel profile slab was "flat-rolled" within the technical meaning of that term.

*Ante* at 19 (emphases added).

To be sure, as I discuss below, there is evidence that the product *might have been* "further worked," but that is not evidence of "further working." It is well established that speculation does not constitute "substantial evidence." As the Supreme Court noted in *Bowen v. American Hospital Ass'n*: "Agency deference has not come so far" that agency action is upheld "whenever it is possible to 'conceive a basis' for administrative action." 476 U.S. 610, 626 (1989); see also *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order \* \* \*. There must be such a responsible finding."). Under these circumstances, Commerce's conclusion that there was evidence of "further working" necessarily falls.

### IV

The majority appears to sustain Commerce on a ground not articulated by the agency—that the uncertainty as to "further working" renders the Plate Orders ambiguous. Quite apart from its apparent failure to abide by the *Chenery* rule, barring affirmance of agency decisions based on new arguments by counsel, 318 U.S. at 95, the majority's



theory is, I think, incorrect. The majority states that "the Commerce Department and the Court of International Trade \* \* \* considered the brochure's statements for the limited purpose of determining whether the Orders unambiguously included or excluded the Reiner Brach profile slab \* \* \*." *Ante* at 19-20. To support its conclusion that Commerce properly found an ambiguity, the majority cites evidence of possible "further working" by noting that "Reiner Brach *could possibly* have had additional treatment done on its profile slabs so as to have that steel product 'flat-rolled,' i.e., 'further worked.'" *Id.* at 18 (emphasis added). The majority further states that Commerce

could read these other statements [in the brochure regarding the market for the profile slabs and the ultrasonic testing] to confirm that Reiner Brach *may indeed have undertaken* processes to help refine and test its steel \* \* \*. This inference is further bolstered by the admission that Novosteel apparently made in its brief about Reiner Brach having its profile slab produced at a "two high reversing mill," a mill that is *capable* of producing the type of steel covered by the Plate Orders.

*Id.* at 19 (emphases added).

The possibility that these products were "further worked" does not render the Plate Orders ambiguous. In other words, the existence of an inadequate record concerning the characteristics of these products does not create an ambiguity as to the scope of the Plate Orders. We should not approve an approach under which Commerce can simply fail to investigate, and then declare a resulting ambiguity as to whether a product is within the scope of an order. In light of this skeletal record, the appropriate recourse is to remand this case to Commerce for a determination of the "further working" issue on an adequate record.

For the foregoing reasons, I respectfully dissent in part.

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FORD MOTOR CO., PLAINTIFF-APPELLANT v.  
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01-1052

(Decided April 12, 2002)

Charles J. Cooper, Cooper, Carvin & Rosenthal, PLLC, of Washington, DC, argued for plaintiff-appellant. With him on the brief was David H. Thompson. Of counsel on the brief were Steven H. Becker, Paul A. Horowitz, and Scott D. Shauf, Coudert Brothers, of New York, New York. With them on the brief was Paul Vandeventer, Ford Motor Company, of Dearborn, Michigan.

Amy M. Rubin, Attorney, Civil Division, Commercial Litigation Branch, Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Stuart E. Schiffer, Deputy Assistant Attorney General, and David M. Cohen, Director. Of counsel on the brief was Sheryl A. French, General Attorney, Office of Assistant Chief Counsel, United States Customs Service, of New York, New York.

Appealed from: United States Court of International Trade  
Chief Judge GREGORY W. CARMAN

Before RADER, SCHALL, and BRYSON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* SCHALL. Dissenting opinion filed by *Circuit Judge* BRYSON.

SCHALL, *Circuit Judge*.

Ford Motor Company ("Ford") appeals the final decision of the United States Court of International Trade that sustained the denial, by the United States Customs Service ("Customs"), of Ford's protest concerning the liquidation of certain entries of merchandise. *Ford Motor Co. v. United States*, 116 F. Supp. 2d 1214 (Ct. Int'l Trade 2000) ("*Ford II*"). In its decision, which followed a trial, the court held that Customs' three extensions, under 19 U.S.C. § 1504(b),<sup>1</sup> of the one-year time period for liquidating the entries under 19 U.S.C. § 1504(a) were legally permissible. The court rejected Ford's contention that the extensions were unreasonable and that consequently the entries were "deemed liquidated" pursuant to section 1504(a) at the rate of duty asserted by Ford upon entry between December of 1985 and February of 1986, rather than at the rate of duty determined by Customs in December of 1989. Because we conclude that Ford established at trial that Customs' delay in liquidating the entries was unreasonable, we reverse and remand the case to the Court of International Trade for entry of judgment in favor of Ford.

#### BACKGROUND

##### I.

The relevant facts are set forth in our previous opinion in this case, *Ford Motor Co. v. United States*, 157 F.3d 849 (Fed. Cir. 1998) ("*Ford I*"). They are as follows:

Ford operates an assembly plant in Louisville, Kentucky, at which it manufactures both cars and trucks using imported foreign engines and transmissions. See *Ford I*, 157 F.3d at 852. In 1983, Ford applied to establish a Foreign Trade Subzone ("FTSZ") at the plant, pursuant to 15 C.F.R. §§ 400.600-603.<sup>2</sup> Ford's application was approved, and an FTSZ was established at the Louisville plant. The Louisville FTSZ operated between November of 1985 and February of 1986. *Ford I*, 157 F.3d at 853.

An FTSZ is an area inside the United States that may receive treatment under the Customs laws as a territory outside the United States. See generally, 15 C.F.R. § 400.1(c) (2000). At an FTSZ, an importer has the "choice of paying duties either at the rate applicable to the foreign material in its condition as admitted into a zone, or if used in manufac-

<sup>1</sup> Unless otherwise indicated, all statutory citations are to the 1982 version of the United States Code, the relevant provisions of which were in effect, or equivalent to the provisions in effect, during the period of time pertinent to this case.

<sup>2</sup> Unless otherwise indicated, all regulation citations are to the 1985 version of the Code of Federal Regulations, the relevant provisions of which were in effect, or equivalent to the provisions in effect, during the period of time pertinent to this case.

turing or processing, to the emerging product." *Ford I*, 157 F.3d at 852; see also *Armco Steel Corp. v. Stans*, 431 F.2d 779, 782 (2d Cir. 1970).

During the relevant time period, the duty rate published in the Tariff Schedules of the United States for cars imported into the United States was 2.6% *ad valorem*, while the duty rate for imported trucks was 25% *ad valorem*. The duty rate for engines and transmissions for both cars and trucks was 3.3%. Under these circumstances, the optimal exploitative strategy for Ford was to import engines and transmissions into the Louisville FTSZ, and then segregate those utilized to assemble cars from those utilized to assemble trucks. Ford planned to treat the segregated car parts as "foreign merchandise" (viewing the plant as being on foreign soil). It then would pay the 2.6% duty on the emerging "imported" car. At the same time, Ford planned to treat the segregated truck parts as "domestic merchandise" (viewing the plant as being on United States soil). It then would pay the 3.3% duty rate on the "imported" engines and transmissions, thereby avoiding the 25% duty rate for completed trucks.

Regulations that were in effect required that Ford conduct its FTSZ operations in a certain manner. First, it had to identify each part entering the Louisville FTSZ as either a car part or a truck part. Ford then had to designate all car parts as "non-privileged foreign" merchandise and all truck parts as "privileged domestic" merchandise on a Customs Form 214 ("214 form"). See 19 C.F.R. § 146.12(a). To designate merchandise as either "non-privileged foreign" or "privileged domestic," the importer checks a box on the 214 form that is labeled with the corresponding designation. See 19 C.F.R. §§ 146.31, 146.32.

Duties on "non-privileged foreign" merchandise are not due and payable until the merchandise leaves the FTSZ. See 19 C.F.R. § 146.48(e); see also 19 C.F.R. § 146.23. Thus, Ford could defer payment of duties on car transmissions and engines until it had installed them in completed cars. In that way, Ford could capture the duty rate for cars (2.6%) rather than car parts (3.3%). Duties for "foreign domestic" merchandise, however, are due and payable upon entry of the merchandise into the FTSZ. See 19 C.F.R. § 146.22(a); see also 19 C.F.R. § 146.44. Thus, the regulations required that Ford pay the duty on engines and transmissions to be installed in trucks as they entered the FTSZ. In short, in order to operate the Louisville FTSZ in accordance with the applicable regulations, Ford had to determine and designate the future usage of each part. Then, based on that usage, Ford had to identify the correct FTSZ status for the part and make duty payments at the proper time.

During the three months it operated the FTSZ at its Louisville plant, Ford received eleven entries of merchandise from abroad. The merchandise consisted of transmissions and engines that Ford used in the manufacturing of vehicles. Apparently through error, however, Ford made incorrect entries with respect to the merchandise on the required 214 forms. Specifically, Ford's agent at the Louisville FTSZ designated each transmission and engine in the eleven entries it received at the

FTSZ between December of 1985 and February of 1986, including those labeled as truck parts, as "non-privileged foreign." Consequently, to the extent it intended to treat any of the entries as "privileged domestic," Ford failed to pay duties associated with these parts, as required by the governing regulations. See 19 C.F.R. § 146.22; *Ford I*, 157 F.3d at 853. Ford's 214 forms also were "replete with errors" regarding product descriptions, duty rates, and tariff item numbers. *Ford II*, 116 F. Supp. 2d at 1218.

Ford reported its 214 form error to Customs. As a result of Ford's failure to designate the engines and transmissions destined for trucks as "privileged domestic," and therefore pay the applicable 3.3% *ad valorem* duty rate upon entry of the parts into the FTZ, Customs asserted that the parts exited the FTZ (and thus entered the United States) as parts of completed trucks and were thus subject to a 25% *ad valorem* duty. *Ford I*, 157 F.3d at 853.

In due course, Customs Agent Richard McNally began an investigation to determine the proper amount of duty that was due. In July of 1986, McNally prepared an initial internal report in which he concluded that the designations in Ford's 214 forms "had been improper, that the proper duty rate on the truck parts was 25%, and that Ford owed approximately \$5.3 million in additional duties." *Id.* at 854. Further, citing the "significant amount of duty involved," McNally referred the case to Customs' Office of Enforcement/Investigation for a possible fraud investigation. *Ford II*, 116 F. Supp. 2d at 1218. In August of 1986, pursuant to 19 U.S.C. § 1592,<sup>3</sup> Customs initiated a civil fraud investigation, which continued until at least March of 1990.

Pursuant to 19 U.S.C. § 1504(a), an entry of merchandise that is not liquidated within one year of the date of entry is deemed liquidated at the rate of duty asserted upon entry by the importer, unless the period for liquidation is extended under 19 U.S.C. § 1504(b). On the basis of the ongoing fraud investigation, Customs issued three one-year extensions of the statutory one-year liquidation deadline. The extensions were issued on or about October 22, 1986, mid-to-late October of 1987, and October 18, 1988. *Ford II*, 116 F. Supp. 2d at 1219 n.3. Eventually, on December 1, 1989, Customs liquidated the eleven entries with a 25% duty on all parts asserted to be truck parts in the entries. The total additional duty amounted to approximately \$ 5.3 million. *Ford I*, 157 F.3d at 854. It appears from the record that Customs completed its fraud investigation around March of 1990. *Id.*

Ford timely protested the liquidations, contending, *inter alia*, that the eleven entries of engines and transmissions were deemed liquidated by operation of law at the rate asserted on importation, which (as far as the parts asserted to be truck parts were concerned) was 3.3%. Ford argued that Customs had not shown that "information needed for the proper

<sup>3</sup> Section 1592(a)(1) proscribes the entry of merchandise into the United States "by fraud, gross negligence, or negligence." The section further provides for procedures for conducting investigations of fraud, gross negligence, and negligence in the entry of merchandise, as well as the penalties that result from violations.

appraisement or classification of the merchandise [was] not available to the appropriate customs officer" to justify the three extensions under 19 U.S.C. § 1504(b)(1). After Customs denied the protest, Ford paid the assessed duties and initiated an action in the Court of International Trade to challenge the liquidations pursuant to 28 U.S.C. § 1581(a). *Ford I*, 157 F.3d at 854. On cross-motions for summary judgment, the court rejected Ford's claim, holding that, as a matter of law, the ongoing fraud investigation justified Customs' issuance of the three extensions before liquidating the entries. *Ford Co. v. United States*, 979 F. Supp. 874 (Ct. Int'l Trade 1997).

## II.

Ford appealed the Court of International Trade's grant of summary judgment to this court, which analyzed whether Ford had presented sufficient evidence to raise a genuine issue of material fact regarding the propriety of Customs' successive extensions that delayed liquidation. In so doing, we interpreted 19 U.S.C. § 1504(b)(1) as requiring both that the investigation allegedly justifying the extension be reasonably expected to produce information regarding appraisement or classification and that Customs seek that information in a reasonable amount of time. *Ford I*, 157 F.3d at 856-57. Applying that standard and construing the evidence in a light most favorable to Ford, we held (1) that "the record does not show that the fraud investigation was reasonably expected to produce information about 'appraisement' and 'classification'" and (2) that "even if Customs expected the investigation to turn up information relevant to appraisement and classification, that expectation alone cannot justify summary judgment," since "the length of the fraud investigation is subject to scrutiny for reasonableness." *Id.* at 857. Accordingly, we vacated the judgment of the Court of International Trade and remanded for a consideration of the propriety of Customs' extensions and delayed liquidation.

## III.

Pursuant to our remand instructions, the Court of International Trade conducted a three-day trial, during which it heard testimony from numerous witnesses with knowledge of Customs' fraud investigation and the decisions to extend the liquidation deadline under 19 U.S.C. § 1504(b)(1). The court held that Ford had failed to establish either that Customs did not reasonably expect the investigation to uncover information regarding classification and appraisal or that Customs did not act reasonably in pursuing that information over a period of three and a half years. *Ford II*, 116 F. Supp. 2d at 1236, 1240. Accordingly, the court determined that Customs' extensions and delayed liquidation complied with 19 U.S.C. § 1504; it therefore entered judgment in favor of the

United States. *Id.* at 1247.<sup>4</sup> Ford timely appealed the court's final decision. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

#### ANALYSIS

##### I.

As in effect during the relevant period, section 1504 provided in pertinent part as follows:

(a) **Liquidation.** Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year \* \* \* shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer \* \* \*

(b) **Extension.** The Secretary may extend the period in which to liquidate an entry \* \* \* if—

(1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer; \* \* \*

19 U.S.C. § 1504(a), (b). In *St. Paul Fire & Marine Insurance, Co. v. United States*, 6 F.3d 763, 768 (Fed. Cir. 1993), we acknowledged that Customs possesses broad discretion concerning whether a liquidation extension is warranted under 19 U.S.C. § 1504(b)(1). *See also* 19 U.S.C. § 3 (providing that "the Secretary of the Treasury shall direct the superintendence of the collection of the duties on imports as he shall judge best."). As a result of that discretion, and "the presumption of regularity [that] presume(s) that the import specialist properly performed [his] duties," *St. Paul*, 6 F.3d at 769, Ford bore a heavy burden in attempting to demonstrate that Customs abused its discretionary authority by issuing the liquidation extensions that are at issue.

We review the Court of International Trade's conclusions of law *de novo*. *Bestfoods v. United States*, 260 F.3d 1320, 1323 (Fed. Cir. 2001). Following a trial, we review the court's findings of fact for clear error. *See Better Home Plastics Corp. v. United States*, 119 F.3d 969, 971 (Fed. Cir. 1997); *Casio, Inc. v. United States*, 73 F.3d 1095, 1097 (Fed. Cir. 1996). The clear error standard requires us to accept the Court of International Trade's findings of fact unless we are left with a "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Inwood Labs., Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982). Whether Customs abused its discretion either in extending the liquidation deadline under 19 U.S.C. § 1504(b)(1) or in pursuing its fraud investigation under 19 U.S.C. § 1592 is a question of fact. *See St. Paul*, 6 F.3d at 768.

##### II.

On appeal, Ford challenges the rulings of the Court of International Trade regarding both issues remanded by this court in *Ford I*. Specifically, Ford argues that Customs abused its discretion by issuing three

<sup>4</sup> The Court of International Trade rejected Ford's argument that its failure to pay duties before entering the truck engines constituted a correctable clerical error under 19 U.S.C. § 1520(c)(1)—a ruling that Ford does not challenge on appeal. *Id.* at 1241-46.



successive extensions of the statutory liquidation deadline under 19 U.S.C. § 1504(b)(1). According to Ford, the fact that Customs was conducting a fraud investigation under 19 U.S.C. § 1592 did not justify the extensions, since Customs failed to identify a single piece of information "needed for the proper appraisalment or classification of the merchandise." 19 U.S.C. § 1504(b)(1). Further, Ford contends, irrespective of whether Customs reasonably expected to uncover such information, the Court of International Trade erred in deeming Customs' efforts in pursuing the fraud investigation reasonable. Ford interprets the trial testimony as revealing an investigation characterized by unjustifiable delays and prolonged periods of inactivity. For that reason, Ford argues that the manner in which the investigation was conducted fell well short of this court's requirement that "Customs [take] a reasonable amount of time to seek" the information related to classification and appraisalment. *Ford I*, 157 F3d at 857. For its part, the government argues that Customs enjoys wide discretion and a presumption that it acted reasonably in conducting the investigation. *See St. Paul*, 6 F3d at 769. Further, the government contends that the delay in the investigation was justified by its complexity, the heavy caseloads of the agents conducting the investigation, and the diversion of the agents' resources necessitated by the opening of a new Customs office in Bowling Green, Ohio.

Our review in this case has been greatly aided by the Court of International Trade's careful and thorough findings of fact with respect to what occurred between August of 1986, when Customs commenced the fraud investigation, and December of 1989, when it liquidated the eleven entries of motor vehicle transmissions and engines that are at issue. Not surprisingly, neither Ford nor the government challenges those findings of fact. What the parties do dispute are the Court of International Trade's two ultimate findings of fact: that Customs did not abuse its discretion in extending the deadline for liquidation on account of its reasonable belief that it would adduce information relating to classification or appraisal in the fraud investigation; and that Customs took a reasonable amount of time to pursue that information in its investigation. Ford argues that the court erred with respect to both ultimate findings. We agree with Ford on the second point, for we conclude that irrespective of whether Customs reasonably expected the fraud investigation to produce information relating to classification or appraisal, Customs' delay in pursuing the fraud investigation and its resulting delay in liquidating the entries were not reasonable. In other words, while we accept all of the Court of International Trade's operative findings of fact, we respectfully part company with the court on the ultimate conclusion to be drawn from those facts.<sup>5</sup>

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<sup>5</sup> Our disposition of the case, of course, renders moot the question of whether Customs reasonably believed that the section 1592 investigation would produce information relevant to liquidation.

## III.

The eleven entries at issue entered the FTSZ at various times between December of 1985 and February of 1986. The last entry occurred on February 7, 1986, so that the regular one-year period for liquidating all eleven entries at issue would (absent any extensions) have expired, pursuant to 19 U.S.C. § 1504, one year after that date. As noted above, Customs began its fraud investigation in August of 1986 after receiving Agent McNally's referral the previous month. McNally issued the first extension of liquidation in October of 1986.

After reviewing the evidence adduced at trial, the Court of International Trade concluded that Ford had "not demonstrated that the amount of time consumed [by the section 1592 investigation] was unreasonable." *Ford II*, 116 F. Supp. 2d at 1239. The court first considered the progress of the fraud investigation under the auspices of Special Agent George Fritz, from its inception in August of 1986 until November of 1987, when the matter was reassigned to Special Agent Charles Kyle, a period of approximately 16 months. During that time, Fritz conducted a series of interviews related to the investigation—the last of which occurred on March 4, 1987. *Id.* The Court of International Trade acknowledged that in the eight months between that interview and the transfer of the investigation to Agent Kyle, "it does not appear Fritz conducted additional activities on the case." *Id.* However, the court declined to equate such inactivity with an abuse of Customs' discretion in conducting the investigation, in light of Fritz's "other commitments and time constraints," including other investigations and absences for sick leave, that "limited his ability to work on the case." *Id.* The second extension of liquidation was issued in October of 1987, during this period of inactivity. *Id.* at 1219 n.3.

After concluding that Customs conducted the section 1592 investigation reasonably under Agent Fritz, the Court of International Trade turned to the progress of the investigation under Agent Kyle. Agent Kyle was responsible for the investigation from November of 1987 through its completion in March of 1990. It was during this period, in October of 1988, that McNally issued the third and final extension of liquidation. *Id.* at 1219 n.3, 1238–39. It also was during this period that Customs eventually liquidated the eleven entries at issue in December of 1989.

During Kyle's first month leading the investigation, he familiarized himself with the file and determined that, in order to complete the inquiry, he needed to gather additional information and to conduct interviews with various Customs personnel. *Id.* at 1238. However, after that initial determination was made, the investigation lay dormant for over fourteen months, until Kyle met with Fritz and McNally in February of 1989. Thereafter, Agent Kyle conducted several interviews and ultimately completed the investigation around March of 1990. *Id.* at 1240.

Agent Kyle testified that he was unable to complete the investigation more quickly because he was awaiting information he had requested

from McNally—who had referred the Ford case for investigation. Kyle also testified that he could not complete the investigation until he interviewed four or five additional witnesses. *Id.* at 1225. He further testified that he was delayed in completing the investigation by his heavy workload, which included 25–50 cases and responsibilities attendant to setting up a new Customs office in Bowling Green. *Id.* at 1239. These responsibilities included “hiring and training staff, obtaining furniture and equipment, and handling all administrative” tasks of the new office. *Id.* Kyle’s supervisor, Robert Cortesi, testified that the delay in conducting the Ford investigation was reasonable, in view of Kyle’s workload. The Court of International Trade agreed. *Id.* at 1239–40.

Having reviewed the record, we are unable to agree with the Court of International Trade’s ultimate finding: that Customs did not act unreasonably in terms of the amount of time it took to complete the section 1592 fraud investigation.

The fraud investigation consumed a total of 44 months, from August of 1986, when it was opened, until March of 1990, when it was completed. During that period, liquidation was delayed for approximately 36 months, from the initial one-year statutory deadline that (without any extensions) would have lapsed (for the first entry) in December of 1986, until Customs finally liquidated the entries in December of 1989. Significantly, during the 16 months when Agent Fritz was conducting the investigation, (August of 1986—November of 1987), he devoted hardly any time to the inquiry, and he performed no work on it during the latter half of his tenure (March of 1987—November of 1987). *Ford II*, 116 F. Supp. 2d at 1039. Moreover, after the case was transferred to Agent Kyle in November of 1987, aside from reviewing the progress of the investigation with his supervisor, Kyle performed virtually no substantive work on the investigation in the fourteen months between December of 1987 and February of 1989, when he met with Agents Fritz and McNally.

Though Customs enjoys wide discretion in liquidating entries, that discretion is not unbridled. *St. Paul*, 6 F.3d at 768; *Ford I*, 157 F.3d at 857. Even accepting the Court of International Trade’s view of the evidence, in which Agent Fritz’s sick time, Agent Kyle’s responsibilities in starting the Bowling Green Office, and the workload carried by both agents delayed the fraud investigation, we cannot escape the conclusion that both the manner of conducting the investigation and the length of the investigation were unreasonable. Simply put, the first 30 months of the 44-month investigation (August of 1986—February of 1989) saw almost no substantive work and two periods of inactivity totaling 22 months (March of 1987—November of 1987 and December of 1987—February of 1989). It was during that 30-month period that Customs issued all three extensions of liquidation under section 1504(b)(1).

We do not hold that, in times of natural or national calamity, repeated extensions of liquidation and periods of inactivity could not withstand judicial scrutiny for reasonableness. Customs’ delay in this case did not occur in such a setting, however. Rather, Customs sought to explain its

delay in conducting the fraud investigation by pointing to typical day-to-day workplace exigencies, such as competing responsibilities, an agent taking sick leave, and the various tasks associated with starting a new office. Acceptance of these exigencies as excuses for Customs' lengthy delay in this case would leave the statutory objective of prompt liquidation, and this court's requirement that any liquidation delays be reasonable, largely meaningless. See 19 U.S.C. § 1504; *Ford I*, 157 F.3d at 856-57. Put another way, were we to hold that Customs did not abuse its discretion in issuing the three extensions of liquidation at issue in this case, we would be setting an unacceptably low bar for reasonableness. Accordingly, we hold that Ford proved by a preponderance of the evidence that the length of Customs' investigation and the manner in which Customs conducted the investigation were unreasonable. Consequently, liquidation of the eleven entries at issue was not properly extended under 19 U.S.C. § 1504(b)(1). As a result, the entries must be deemed liquidated under 19 U.S.C. § 1504(a).

#### CONCLUSION

For the foregoing reasons, the decision of the Court of International Trade in favor of the United States is reversed. The case is remanded to the court for entry of judgment in favor of Ford.

#### REVERSED AND REMANDED

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BRYSON, *Circuit Judge*, dissenting.

I respectfully dissent. While I share the majority's concern about the lengthy delays in the investigation of this case, I would not reverse the trial court's decision that, under all the circumstances, the delay was not shown to be unreasonable.

By statute, Customs is accorded broad discretion to obtain extensions for up to four years to liquidate entries. 19 U.S.C. § 1504(b). An extension need not be applied for; rather, Customs may unilaterally obtain extensions of the one-year statutory liquidation period if "the information needed for the proper appraisalment or classification of the merchandise, or for insuring compliance with applicable law, is not available to the Customs Service" or if the importer requests the extension. This court has made clear that Customs enjoys very broad discretion in determining whether to seek extensions as long as the total pre-liquidation period does not exceed four years. See *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767-68 (Fed. Cir. 1993) (discussing in detail the statutory and regulatory design for obtaining extensions of liquidation). This court set out the governing standard in *St. Paul*, the leading decision on this point:

Customs may, for statutory purposes and with the requisite notice, employ up to four years to effect liquidation so long as the exten-

sions it grants are not abusive of its discretionary authority. Such an abuse of discretionary authority may arise only when an extension is granted even following elimination of all possible grounds for such an extension. There is, in sum, a narrow limitation on Customs' discretion to extend the period of liquidation.

6 F.3d at 768.

The Court of International Trade in this case held a three-day trial and subsequently wrote a lengthy opinion in which it analyzed in detail the circumstances surrounding the extensions obtained by Customs in this case. For reasons set forth in its opinion, the court concluded that Ford had not met its burden of showing that the amount of time consumed by the investigation was unreasonable; the court therefore held that this case did not fall within the "narrow limitation" on Customs' discretion to obtain extensions of the time for liquidating the subject entries.

The trial court examined the conduct of the two agents who were principally responsible for the investigation during the period in which the three extensions were obtained. With respect to the period August 1986 through November 1987, when the investigation was assigned to Agent Fritz, the trial court noted that "there was activity on the case from the time the case was assigned to Fritz in August 1986 at least through March 4, 1987, when Fritz interviewed Art Trussell, the former Louisville Port Director." The fact that there was no apparent activity on the case for the following eight months, the court explained, "does not show the inactivity was necessarily unreasonable." Rather, the court noted that the evidence showed that Agent Fritz "had other commitments and time constraints which limited his ability to work on the case," including being assigned to other investigations, working as the sole staff at the new Bowling Green office for a 30-day period, and being out on sick leave at the time the investigation was transferred. Based on the evidence adduced at trial, the court concluded that "the time it took Fritz to conduct the Ford investigation, given Fritz's overlapping obligations, cannot be found by this Court to be unreasonable."

The court likewise examined the period between November 1987 and October 1988, when the third extension was obtained. During that period, Agent Kyle was in charge of the investigation. Again, based on the evidence at trial, the court found that the period of delay was not unreasonable. During that period, the court noted, Agent Kyle was waiting for information from another Customs agent, and he also needed to interview four or five witnesses. It was not unreasonable that Agent Kyle failed to conduct those interviews earlier, the court concluded, "as he had a heavy caseload and had numerous responsibilities in connection with setting up the Bowling Green office during the time in which he was assigned to the case."

The question whether Ford satisfied its burden of establishing that the particular periods of delay were unreasonable under all the circumstances is intensely factual. The majority acknowledges that we must

uphold the trial court's finding on the issue of reasonableness unless the trial court was clearly erroneous in reaching that conclusion. I do not believe Ford has satisfied that standard in this case.

In overturning the trial court's conclusion that the investigative delay in this case was not unreasonable, the majority focuses on the two lengthy periods of inactivity in the investigation—the eight-month period between March and November 1987, and the 11-month period between November 1987 October 1988. The majority does not accept the trial court's conclusion that those periods of inactivity were reasonable in light of the competing workload commitments, administrative burdens, and sick leave taken by the agents responsible for the investigation.

That is where I part company with the majority. While long periods of inactivity in an investigation certainly raise questions whether the investigation is being pursued with diligence, the mere fact that there are long periods of inactivity does not render the ensuing delay unreasonable. Presumably, the majority would have been more prepared to find the delays in this case excusable if the agents had taken some investigative steps from time to time rather than doing nothing on the investigation for lengthy periods. The problem is that some work lends itself to being done piecemeal, and some does not. In my view, a delay is not necessarily unreasonable if a busy agent who has many investigations to conduct puts a particular investigation at the end of his queue and does not begin to work on it for an extended period of time.

While it is surely not ideal to have lengthy delays built into an administrative system because of workload levels, it is not unusual. Competing demands are a fact of life, particularly in an investigative bureaucracy in which each agent has multiple investigative responsibilities. In such a setting, investigators often find that it is more efficient to postpone working on one matter until another is completed, rather than attempting to work on multiple matters simultaneously. Nor is this phenomenon peculiar to investigative agents. Others with heavy workloads, such as busy lawyers (and, indeed, even busy judges), often postpone beginning work on particular matters until other matters with more pressing deadlines or earlier spots in the work queue have been completed. For that reason, the fact that no work is done on a particular matter for an extended period of time, or that there are long workload-related periods of delay during which no progress is made on a particular project, does not mean that the delay is unreasonable.

Of course, if Ford had persuaded the trial court that the lack of progress on the investigation was the result of indolence or inattention on the part of the agents or the Customs Service generally, that would be a different matter. But the trial court concluded after hearing three days of evidence in this case that the agents' competing obligations and other factors provided an adequate explanation for the lengthy periods of delay. Because I do not think the trial court committed clear error in that regard, I would affirm.



ALLEGHENY LUDLUM CORP, AK STEEL CORP (FORMERLY ARMCO, INC.), BUTLER ARMCO INDEPENDENT UNION, J&L SPECIALTY STEEL INC., NORTH AMERICAN STAINLESS, THE UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, AND ZANESVILLE ARMCO INDEPENDENT ORGANIZATION, PLAINTIFFS-APPELLANTS v. UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01-1223

(Decided April 19, 2002)

*Kathleen W. Cannon*, Collier Shannon Scott, PLLC, of Washington, DC, argued for plaintiffs-appellants. With her on the brief were *R. Alan Luberda* and *David A. Hartquist*. *Neal J. Reynolds*, Attorney, Office of General Counsel, U.S. International Trade Commission, of Washington, DC argued for defendant-appellee. With him on the brief were *Lyn M. Schlitt*, General Counsel, and *James M. Lyons*, Deputy General Counsel.

Appealed from: United States Court of International Trade  
Judge EVAN J. WALLACH

Before LOURIE, CLEVINGER, and GAJARSA, Circuit Judges.

CLEVINGER, Circuit Judge.

Allegheny Ludlum Corporation, AK Steel Corporation, Butler Armco Independent Union, J&L Specialty Steel Inc., North American Stainless, The United Steelworkers of America, AFL/CIO/CLC, and Zanesville Armco Independent Organization (collectively "Allegheny"), appeal from a decision of the United States Court of International Trade affirming a Final Determination of the International Trade Commission that the U.S. steel industry was not materially injured by imports of stainless steel coiled plate from Belgium and Canada. Because the Final Determination is flawed as to each of the three statutory factors the Commission is obligated to consider, the decision of the Court of International Trade to affirm is improper. For this reason, we vacate and remand.

I

Under the statutory scheme established by the Tariff Act of 1930, as amended, American industries may petition for relief from imports that are sold in the United States at less than fair value ("dumped"), or which benefit from subsidies provided by foreign governments. 19 U.S.C. § 1675b (2000). The International Trade Commission ("Commission") is charged with determining whether the imported merchandise in question either materially injures or threatens to materially injure American domestic industry. As part of this material injury analysis, the Commission is obligated to delineate the relevant domestic industry by making a "domestic like product" determination, assessing which domestic product most closely corresponds to the imported merchandise in question. 19 U.S.C. §§ 1677(4), (10).

In 1998, responding to a petition for relief by the domestic steel industry, the Commission commenced an anti-dumping inquiry directed towards imported merchandise consisting of stainless steel plate in coils.

Following a determination by the Department of Commerce ("Commerce") that the imports were indeed being dumped onto the American market, the Commission evaluated whether these products materially injured domestic industry.

In the preliminary phase of the investigation, concluded in May 1998, the Commission found a single domestic like product, namely "certain stainless steel plate in coils." However, in its Final Determination, issued in May 1999, the Commission reached a different conclusion, determining that two domestic like products corresponded to the relevant imports: 1) hot-rolled steel coiled plate and 2) cold-rolled steel coiled plate. The Commission determined that all stainless steel plate in coils fell in one of these two categories.<sup>1</sup> These products differ in their qualities and uses. Cold-rolled plate is thinner and has a smoother finish than hot-rolled plate, and is used in applications such as food processing, beer-making, and dairy containers. In contrast, hot-rolled plate is used in articles such as equipment and storage tanks. As cold-rolled plate requires additional processing, it is more costly than hot-rolled plate. Over 99.9 percent of domestic steel plate production is hot-rolled plate. Because it found hot and cold-rolled steel plate to be two distinctly different products, the Commission considered separately whether the respective domestic industries producing them had been injured by the subject imports of stainless steel plate in coils. The Commission determined that while the domestic hot-rolled steel plate industry had indeed been materially injured by the subject imports, the domestic cold-rolled steel plate industry had not.

Before the Court of International Trade, Allegheny challenged both the Commission's determination that hot- and cold-rolled steel plate constituted separate domestic like products, as well as the Commission's finding that the domestic cold-rolled steel plate industry suffered no material injury as a result of the imported merchandise.

The Court of International Trade affirmed the Commission's Final Determination. *Allegheny Ludlum Corp. v. United States*, 116 F. Supp. 2d 1276 (Ct. Int'l Trade 2000). The Court found that substantial record evidence supported the determination that hot- and cold-rolled steel plate constituted separate domestic like products. *Id.* at 1287-88. As to the determination of no material injury, the Court of International Trade found the Commission's analysis legally flawed as to each of the three factors, volume, price, and impact, that 19 U.S.C. § 1677(7)(B) directs the Commission to consider.<sup>2</sup> *Id.* at 1288-1307. The Court of International Trade determined that the Commission had grounded its Final Determination of no material injury on an additional basis, that the domestic industry exhibited a "lack of interest" with regard to the market

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<sup>1</sup> The Commission's Final Determination applied only to stainless steel plate in coils, expressly excluding stainless steel plate not in coils. For ease of discussion, we will refer to the product as "steel plate" or "plate."

<sup>2</sup> Despite stating that the "Commission's 'volume' analysis was in accordance with law and supported by substantial evidence," *Allegheny*, 116 F. Supp. 2d at 1289, the Court of International Trade expressly noted that it evaluated substantial components of the volume analysis under other sections of the opinion. *Id.* at 1293. Common findings of error are consequently attributable to the volume analysis as well.

for cold-rolled steel plate. *Id.* at 1303. Evidence to this effect consisted in large part of statements made by industry representatives before the Commission that cold-rolled steel plate represented an almost negligible market in which domestic manufacturers had no plans to participate. The Court of International Trade affirmed the Final Determination, notwithstanding the errors in the remainder of the Commission's analysis, finding the evidence of the industry's lack of interest sufficient to sustain the overall finding of no material injury. *Id.* at 1307-8.

On appeal to this court, Allegheny challenges only the portion of the decision of the Court of International Trade affirming the Commission's finding of no material injury as to the domestic cold-rolled steel plate industry.

## II

We review the Commission's conclusions of law *de novo*. *United States Steel Group v. United States*, 96 F.3d 1352, 1356 (Fed. Cir. 1996).

We review the Court's evaluation of Commission factual determinations by stepping into the shoes of the Court and duplicating its review, *Taiwan Semiconductor Indus. Ass'n v. Int'l Trade Comm'n*, 266 F.3d 1339, 1343-44 (Fed. Cir. 2001), evaluating whether Commission determinations are unsupported by substantial evidence or otherwise not in accordance with law. 19 § U.S.C. 1516a(b)(1)(B)(i); *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997).

## III

Section 1677(7)(A) defines material injury as "harm which is not inconsequential, immaterial, or unimportant." Section 1677(7)(B) sets forth the factors the Commission is to evaluate in making its material injury determination. It provides that the Commission:

(i) shall consider—

- (I) the volume of imports of the subject merchandise,
- (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
- (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States; and

(ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

19 U.S.C. § 1677(7)(B) (2000).

Allegheny asserts that the Commission's analysis of each of the mandatory factors of subsection (i) is unsupported by substantial evidence or otherwise legally incorrect. Specifically, Allegheny contends that the Commission's analysis of both the volume and impact factors employs a faulty interpretation of 19 U.S.C. § 1677(4)(D), while the Commission's analysis of price is unsupported by substantial evidence. Further, Allegheny asserts that the Court of International Trade erred in affirming,

despite the errors, the Commission's Final Determination on the basis of the industry's lack of interest in the cold-rolled market, a factor not present in the statutory language cited above. We address each of these contentions in turn.

#### IV

Both the price and impact components of section 1677(7)(B)(i) key the Commission's material injury determination to an evaluation of the effect of the imported merchandise on the domestic market for the relevant domestic like product. The "product line provision" of the statute provides an exception to this general rule if necessary data is lacking. This provision directs that the effect of subject imports "shall be assessed in relation to the United States production of a domestic like product if available data permit the separate identification of production in terms of such criteria as the production process or the producer's profits." 19 U.S.C. § 1677(4)(D) (2000). In the alternative:

If the domestic production of the domestic like product has no separate identity in terms of such criteria, then the effect of the [imports] shall be assessed by the examination of the production of the narrowest group or range of products, which includes a domestic like product, for which the necessary information can be provided.

*Id.* The Commission resorted to this alternative, explaining in the Final Determination that:

Because the domestic industry was unable to provide segregated trade and financial data for cold-rolled stainless steel coiled plate, pursuant to the production line provision of 19 U.S.C. § 1677(4)(D), we also assess the effect of the cumulated subject imports on the production of the narrowest group of products that includes cold-rolled plate for which the necessary information could be provided—in this case, all stainless steel coiled plate.

Tension exists between the product line provision and the mandatory volume-price-impact analysis of section 1677(7)(B). To the extent that the Commission is entitled to rely on data from a broader category in the absence of specific information from a narrow subcategory, the relevant material injury analysis can be shifted.<sup>3</sup> Any actual effect of the imported goods on the narrower domestic like product market may be effectively submerged, and lost, upon the inclusion of data from a larger set of domestic products.

We need not fully explore this latent conflict here. Section 1677(4)(D) clearly contemplates the use of product line data as a matter of last resort, when the relevant like product data is simply nonexistent. The statutory language provides that this product line provision is to be

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<sup>3</sup> Indeed, the case at bar provides a good example of this, as the Commission has assessed the effect of the subject imports against the entirety of the domestic stainless steel plate market, rather than against the 0.01% of that market which comprises cold-rolled steel plate.

employed when production of the domestic like product "has no separate identity." Further, the relevant Senate report reads:

In examining the impact of imports on the domestic producers comprising the domestic industry, the ITC should examine the relevant economic factors (such as profits, productivity, employment, cash flow, capacity utilization, etc.), as they relate to the production of only the like product, if available data permits a reasonably separate consideration of the factors with respect to production of only the like product. *If this is not possible because, for example, of the accounting procedures in use or practical problems in distinguishing or separating the operations of product lines*, then the impact of the imports should be examined by considering the relevant economic factors as they relate to the production of the narrowest group or range of products which includes the like product and for which available data permits separate consideration.

S. Rep. 96-249, at 83-84 (1979) reprinted in 1979 U.S.C.A.N 381, 469-70 (emphasis added). These situations are cases in which the domestic like product data is actually unavailable, rather than those in which it is simply difficult to obtain.

The Court of International Trade has previously required the Commission to actively attempt to obtain relevant data before resorting to the product line provision. In *Babcock & Wilcox Co. v. United States*, 521 F. Supp. 479 (Ct. Int'l Trade 1981) *vacated, as moot*, 4 Ct. Int'l Trade 3 (1982), a domestic producer of steel pipes and boiler tubes initiated an anti-dumping complaint against certain Japanese manufacturers. The Commission rendered a negative material injury determination. *Id.* at 482. On appeal to the Court of International Trade, the domestic manufacturer alleged that the Commission had improperly relied on overbroad data for the entire seamless stainless boiler tube industry. The United States, defending the Commission's findings, asserted that such reliance was proper, under section 1677(4)(D), as the several products the plaintiff sought to have investigated had no separate identity. As one commissioner noted, while specific data was available on shipments, exports, and imports for each of the categories of pipe and tube products under investigation, only the petitioner was able to provide profit and loss data on each of these products. *Id.* at 483.

The *Babcock* court found that despite the fact that the Commission's findings stated that all but one of the domestic producers were unable to furnish the Commission with profit information, there was nothing in the record to indicate that the Commission had ever solicited such profit data from domestic producers other than the petitioner. Finding that the Commission, "should have sought such data from the other domestic producers comprising the boiler tube and pipe industry before moving to the broader industry," *id.* at 485, the Court of International Trade held that the Commission's determination of no material injury was unsupported by substantial evidence and not in accordance with law, requiring a remand to the Commission for further development. *Id.* at 487.

We note that the language of section 1677(4)(D) permitting resort to alternative product line data is far stronger than that present in the analogous provision of section 1677e(a), allowing Commerce and the Commission to "use the facts otherwise available" if "necessary information is not available on the record," for the purpose of making anti-dumping duty determinations. 19 U.S.C. § 1677e(a) (2000). Indeed, the actual language of section 1677(4)(D) more closely resembles the language of former section 19 U.S.C. § 1677e(c), stating that Commerce and the Commission "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form requested, or otherwise significantly impedes an investigation, use the best information otherwise available." 19 U.S.C. § 1677e(c) (1988). This language has been consistently interpreted to require active efforts on the part of the Commission and Commerce to obtain relevant data, prior to invoking the best information rule. Examining a dumping determination by Commerce, the Court of International Trade characterized this duty as one "to reasonably avail itself of its own powers to obtain relevant information in the absence of cooperation by a respondent." *Rhone-Poulenc, Inc. v. United States*, 927 F. Supp. 451, 457 (Ct. Int'l Trade 1996). In *Budd Co. Railway Division v. United States* 507 F. Supp. 997, 1001 (Ct. Int'l Trade 1980), the Court of International Trade expressly noted that this information is not limited to "that furnished by the petitioner or by any party-in-interest to the proceedings." Further, as the Commission possesses the authority to issue subpoenas in pursuing its investigations, unlike Commerce, there is an even stronger rationale to believe that the Commission's resort to the product line provision must be accompanied by active efforts on the part of the Commission to acquire relevant data. See *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571 (Fed. Cir. 1990).

The Commission's efforts do not meet this standard. To the extent the Commission determined that the domestic industry was incapable of supplying such information, it is incorrect. As the Final Determination expressly states in footnote 155, the domestic producers "did provide segregated production and shipment quantity and value data for cold-rolled plate." Indeed, the Final Determination even contains tables referring to domestic cold-rolled plate volume and the market share of cumulated subject imports, attributing this limited data to information supplied by importers. To say that the domestic industry was "unable" to supply relevant cold-rolled plate data can mean only that it was unable to do so because the Commission did not expressly ask for such information. Indeed, noting that the Commission "did not collect price comparison data on any cold-rolled plate products," the Final Determination explains this fact as resulting from the failure of any party to request that the Commission do so. The record does not afford substantial evidence to support the Commission's rationale for resorting to section 1677(4)(D). To the contrary, the record supplies ample evidence to reject the Commission's decision to do so.



We also cannot overlook the sequence of the Commission's actions. The domestic industry argued that there should be one, not two, segments of the domestic industry under consideration. The Commission agreed with the domestic industry in its initial determination, stating only that it would reconsider its decision in its Final Determination. The domestic industry did not bear the burden to prove that there are two segments to assess; its litigation strategy was to convince the Commission that only a single segment should be considered. Testimony by domestic industry representatives about the lack of domestic interest in cold-rolled plate, as a result of its small overall volume in the domestic market, was given at the time domestic industry was seeking to convince the Commission to treat cold-rolled plate as part of the overall single domestic market.

In the end, the Commission—never having independently collected any pertinent data about a separate domestic cold-rolled plate industry—decided that the domestic industry was divided into two segments. The practical problem it faced was how to justify its ultimate conclusion of no material injury to the cold-rolled plate segment, absent the necessary data. To address this problem, the Commission decided to rely upon a direct comparison of the data for cold-rolled imports with that for the overall domestic market for stainless steel plate.

Indeed, the Commission's impact analysis hinges upon this, stating that "we find that subject cold-rolled imports are too small in magnitude to have contributed to the observed declines in the profitability, employment or capacity of the domestic industry producing certain stainless steel plate in coils." The Commission's analysis of volume is inspired by a similar view, noting that "domestic industry's production of cold-rolled plate is very limited and that the industry itself has characterized cold-rolled plate as a tiny and unimportant part of its business."

As the Court of International Trade has stated, "[i]t is incumbent on the [Commission] to acquire all obtainable or accessible information from the affected industries on the economic factors necessary for its analysis." *Roquette Freres v. United States*, 583 F. Supp. 599, 604 (Ct. Int'l Trade 1984). "In so doing, it is clear that all information that is 'accessible or may be obtained,' from whatever its source may be, must be reasonably sought by the Commission." *Budd Co. Ry. Div.*, 507 F. Supp. at 1003-04. The Commission may not shirk this duty by asserting a failure of the parties to request that the Commission gather specific information. Indeed, this position has been explicitly rejected. *Rhone-Poulenc*, 927 F. Supp. at 456-57. We thus conclude that the Commission erred in resorting to the product line provision in assessing the volume and impact of the subject imports.

Our decision is not inconsistent with the determination of the Court of International Trade that there was no legal error *per se* in the failure of the Commission to collect specific data. *Allegheny*, 116 F. Supp. 2d at 1295. The Commission does indeed enjoy discretion to conduct its investigation and gather data it deems relevant. *Czestochowa v. United*

*States*, 890 F. Supp. 1053, 1075 (Ct. Int'l Trade 1995). However, the Commission is obligated to make active, reasonable efforts to obtain relevant data. This is particularly true when the Commission seeks to invoke its inability to obtain information on a specific domestic like product in order to rely on the product line provision.

The Commission's failure to attempt to get relevant data prior to resorting to the product line provision renders the Commission's analysis of the volume and impact factors under section 1677(7)(B) legally unsound.

#### IV

With regard to the Commission's price analysis, the Court of International Trade found error in the Commission's use of the average unit values ("AUVs") of the subject imports as indicators of specific price trends. The Court of International Trade noted that our decision in *United States Steel Group v. United States*, 96 F.3d 1352 (Fed. Cir. 1996), expressly declined to "hold, as a general rule, that the Commission may not rely on AUV trends as indicative of corresponding changes in price." *Id.* at 1364. However, the Court of International Trade found that here, as the product mixes of the domestic and foreign merchandise differed, "the fact that for much of the period reviewed the AUVs for subject imports were higher than those for domestic cold-rolled plate, without more, says little about whether there was significant price competition between similarly situated cold-rolled products." *Allegheny*, 116 F. Supp. 2d at 1298.

The Commission did indeed rely on AUVs as indicators of specific price trends in determining that there was no material injury, stating that:

The average unit value of cumulated subject imports declined steadily over the period of investigation, beginning at a higher level than that for the domestic like product and falling below in 1997 and interim 1998. There is no clear connection between the subject imports and the domestic price declines, since, during much of the period, the domestic price decreased even though subject imports were priced substantially higher.

*Certain Stainless Steel Plate from Belgium, Canada, Italy, Korea, South Africa, and Taiwan*, Inv. Nos. 701-TA-376, 377, and 379 (Final) and Inv. Nos. 731-TA-788-793 (Final), USITC Pub. 3188 at 23-4 (May 1999).

This is inaccurate for two reasons, as the Court of International Trade correctly noted. First, the conclusion is logically unsound. Even assuming the Commission's use of AUVs to be proper, the falling prices of the imported merchandise would seem to support a finding of material injury to domestic producers, despite the fact that the subject imports were priced higher than corresponding domestic like products. Second, as the Court of International Trade noted, the AUV data at question here is strongly influenced by a few orders of particular grade or size. *Allegheny*, 116 F. Supp. 2d at 1298. The government does not dispute this, and indeed concedes that "significant product differences [exist] between

the domestic and imported merchandise." This seriously undermines the utility of such data.

Accordingly, the Commission's price determination is not supported by substantial evidence.

## V

In spite of the errors in the Final Determination, the Court of International Trade affirmed the decision of no material injury, finding that "the Commission identified significant evidence showing that the domestic cold-rolled plate industry was not interested in producing and selling cold-rolled plate." *Allegheny*, 116 F. Supp. 2d at 1308.

Considerable evidence does exist to this effect. Before the Commission, representative after representative of the domestic manufacturers stated that although they had the capability to produce cold-rolled plate, they did not. In the words of the steel executives themselves, "there just isn't [a] market for it, as we see it," "[o]ccasionally somebody will need cold-rolled product, but it's so infrequent that we just don't see a market for it," "the market for this product is almost insignificant," and "our customer needs are generally met with a hot-rolled product." At least one of the industry representatives was unfamiliar with whether his company actually produced cold-rolled plate, while an industry consultant described any production of cold-rolled plate as "accidental." *Id.* at 1304. In response to questioning as to whether Allegheny would ever conceivably produce cold-rolled plate, the Allegheny representative flatly stated "no." The no material injury determination of the Final Determination is grounded at least in part on this evidence. In its analysis of volume, the Commission stated, "the industry itself has characterized cold-rolled plate as a tiny and unimportant part of its business." The utility of this evidence, however, is limited by the fact that testimony from the domestic industry sources, frankly admitting little interest in cold-rolled plate due to its small volume in the domestic market, entered the record at a time when the domestic industry was pleading for a single domestic rolled plate industry.

Key to the Commission's initial determination to treat hot and cold-rolled plate as a single domestic like product, from the perspective of domestic industry, was the lack of enthusiasm of domestic industry in the market for cold-rolled plate, as aptly demonstrated by the testimony. In the Final Determination, however, the Commission relied on this lack of interest on the part of domestic industry to buttress its ultimate conclusion regarding the impact and volume assessments, these assessments being based upon flawed reliance on the entire domestic market for steel plate as a surrogate for that of cold-rolled steel plate.

Initially, Allegheny argues that we must reject any reliance on the evidence showing lack of domestic interest in cold-rolled plate. Allegheny asserts that the Supreme Court's decision in *Securities and Exchange Commission v. Chenery*, 332 U.S. 194 (1947), and its progeny compel reversal of the decision of the Court of International Trade, arguing that the Court of International Trade has effectively substituted its judg-

ment for that of the Commission, in affirming the Final Determination on the basis of the lack of interest of domestic industry in the cold-rolled steel plate industry, rather than upon the volume-price-impact analysis. Admittedly, this is a close question. However, we believe that the Court did not substitute its own judgment for that of the Commission. As noted above, the Commission's evaluation of both volume and impact was informed by the underlying perception of a lack of interest on the part of domestic industry. Allegheny's *Chenery* argument must therefore fail.

Allegheny additionally contends that the reliance of the Court of International Trade on such evidence to affirm the Commission's decision is incorrect. Citing our decisions in *Suramerica de Aleaciones Lamina-das, C.A. v. United States*, 44 F.3d 978 (Fed. Cir. 1994) and *Oregon Steel Mills Inc. v. United States*, 862 F.2d 1541 (Fed. Cir. 1988), Allegheny attempts to portray such reliance as inconsistent with prior caselaw finding a lack of interest on the part of domestic industry. This is misplaced. Section 1677(7)(B)(ii) clearly authorizes broad evaluation of any relevant factors, stating that the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." Statements by industry representatives in a formal hearing before the Commission regarding their own motives behind their production, or lack thereof, of domestic like products certainly qualify as relevant. Indeed, as we noted in *Suramerica*, "[t]he industry best knows its own economic interests and, therefore, its views can be considered an economic factor." *Suramerica*, 44 F.3d at 984. The Commission is surely entitled to rely on "other economic factors," but such factors cannot replace the mandatory elements of the analysis, absent a showing that those elements, in a given case, simply cannot be assessed.

Allegheny's strongest contention is thus that the statutory language directing the Commission's work cannot be satisfied by a decision that is flawed as to all three factors in the circumstances of this case. This carries weight. Section 1677(7)(B) sets forth three factors that the Commission is directed to consider in conducting its evaluation of "material injury," using the mandatory "shall" language—price, volume, and impact. Consideration of other factors is permissive.

Our caselaw has clearly interpreted section 1677(7)(B) as requiring the Commission to evaluate each of the mandatory factors in reaching a decision. In *Angus Chemical Co. v. United States*, 140 F.3d 1478 (Fed. Cir. 1998), we sustained a challenge to the Commission's practice of using a "two-step" analysis for material injury, first assessing whether domestic industry had indeed suffered injury, then evaluating to what extent the imported merchandise contributed to the injury. *Id.* at 1483. Although sustaining the Commission's "two-step" practice, the *Angus* court found that the statutory language of section 1677(7)(B) "unmistakably requires the Commission to consider the three listed factors in making its material injury determination." *Id.* at 1484. "[S]ide-stepping

the statutory mandate" in considering less than all of the factors was not justified in order to reach a negative determination. *Id.* at 1485. As a result, the *Angus* court conducted a searching review of the opinions of the concurring commissioners to determine whether sufficient findings had indeed been made as to each of the price, volume, and impact factors. *Id.* at 1486. Under *Angus*, the Commission is thus obliged to conduct a good faith effort to fulfill its statutory mandate.

It is true that our caselaw does not require each of the factors set forth in section 1677(7)(B) to be correctly analyzed by the Commission in order to affirm its decision. Review of this aspect of Commission determinations takes place under the substantial evidence standard. *Taiwan Semiconductor*, 266 F.3d at 1344-45. Under this deferential standard, we have affirmed Commission determinations where the analysis of one of the three mandatory factors is unsupported by substantial evidence. *United States Steel Group*, 96 F.3d at 1364-65 (finding that even were the price-suppression determination not supported by substantial evidence, the decision could be affirmed nonetheless).

Notwithstanding the tolerance of the substantial evidence requirement for Commission determinations which contain some errors, neither the statutory language nor *Angus* permits a court to affirm a Final Determination which is legally flawed as to *each* of the three factors the Commission is obliged to consider, in circumstances showing a failure on the part of the Commission to seek the necessary information to carry out its statutory duties. The Commission is obligated by law to consider volume, price and impact in reaching its determination on the subject of material injury. It is also permitted, under 19 U.S.C. § 1677(7)(B)(ii), to "consider such other economic factors as are relevant to the determination [of material injury]." Permissive authority to consider economic factors in addition to the specific factors that must be considered does not excuse the obligation first to evaluate the mandatory volume, price and impact factors. A contrary holding would eviscerate the requirement that the Commission "consider" each of the mandatory factors. *Angus* stands for the proposition that the Commission must make a good faith effort to carry out its statutory mandate in conducting its review.

For the foregoing reasons, the decision of the Court of International Trade to affirm the Commission's Final Determination is incorrect.

#### CONCLUSION

As each of the statutory factors which the Commission is obligated to consider under section 1677(7)(B) is legally flawed or unsupported by substantial evidence, the decision of the Court of International Trade is

vacated and the case is remanded for proceedings not inconsistent with this decision.

#### COSTS

No costs.

### VACATED AND REMANDED

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ARTHUR L. FRANKLIN (DOING BUSINESS AS HEALTH TECHNOLOGIES NETWORK), PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01-1340

(Decided April 26, 2002)

*Mark T. Coberly*, Vanderventer Black LLP, of Norfolk, Virginia, argued for plaintiff-appellant.

*Arthur J. Gribbin*, Attorney, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Robert D. McCallum, Jr.*, Assistant Attorney General; *David M. Cohen*, Commercial Litigation Branch, Department of Justice, of Washington, DC; and *Joseph I. Liebman*, former Attorney in Charge, International Trade Field Office; and *Aimee Lee*, Attorney, Civil Division, Commercial Litigation Branch, Department of Justice, of New York, New York. Of counsel on the brief was *Beth C. Brotman*, Attorney, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of New York, New York. Of counsel was *John J. Mahon*, International Trade Field Office.

Appealed from: United States Court of International Trade  
*Judge* DONALD C. POGUE

Before LOURIE, GAJARSA, and PROST, *Circuit Judges*.

PROST, *Circuit Judge*.

Arthur L. Franklin d/b/a Health Technologies Network ("Franklin") appeals from the decision of the United States Court of International Trade denying Franklin's motion for summary judgment and granting the government's cross-motion for summary judgment that the United States Customs Service ("Customs") properly classified Franklin's imported coral sand packets under subheading 2106.90.99 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202 ("HTSUS"). *Franklin v. United States*, 135 F. Supp. 2d 1336 (Ct. Int'l Trade 2001). We conclude that the imported goods are properly classified under subheading 8421.21.00 of the HTSUS and therefore reverse.

#### BACKGROUND

The imported goods at issue in this case are coral sand packets that were imported by Franklin in 1995, 1996, and 1997. *Franklin*, 135 F. Supp. 2d at 1337. This coral sand, otherwise known as coral calcium, is



mined from fossilized coral reefs in Okinawa, Japan. After harvesting, the coral is washed, dried, treated with L-ascorbic acid, and packaged in one-gram fiber bags. *Id.* at 1344. When the consumer places one of these fiber bags in a specified amount of water, the coral adds calcium and magnesium ions to the water. This increases the water's pH, rendering it more alkaline or "hardening" it. *Id.* at 1339. The alkaline environment produced by this process kills bacteria in the water. *Id.* Additionally, the L-ascorbic acid reacts with and neutralizes chlorine in the water. *Id.* Less than 5% of the product goes into solution, and the majority of the coral sand is not ingested with the water but instead remains in the fiber bag at the bottom of the glass.

Customs classified the coral sand under subheading 2106.90.99 of the HTSUS, *id.* at 1338, which is a residual, or "basket," provision of heading 2106 that covers "[f]ood preparations not elsewhere specified or included \* \* \* [o]ther," HTSUS, subheading 2106.90.99.<sup>1</sup> Imports classifiable under this subheading were dutiable at a rate of 9.4% (1995), 8.8% (1996), and 8.2% (1997) *ad valorem*. *Franklin*, 135 F. Supp. 2d at 1338. *Franklin* protested this classification and subsequently challenged it in the Court of International Trade. *Id.* According to Appellant, its coral packets were properly classifiable under subheading 8421.21.00 of the HTSUS, *id.* at 1337, which covers:

- 8421           Centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gasses; parts thereof:
- 8421.21       Filtering or purifying machinery and apparatus for liquids:
- 8421.21.00   For filtering or purifying water

HTSUS, heading 8421. Goods classified under subheading 8421.21.00 were subject to duty rates of 3.1% (1995), 2.3% (1996), and 1.6% (1997) *ad valorem*. *Franklin*, 135 F. Supp. 2d at 1337.<sup>2</sup>

Both parties moved for summary judgment. *Id.* at 1338. The Court of International Trade denied *Franklin*'s motion and granted the government's corresponding cross-motion, holding that Customs had correctly classified Appellant's imported goods as a "[f]ood preparatio[n] \* \* \* [o]ther" under subheading 2106.90.99. *Id.* at 1345.

As a preliminary matter, the court concluded that *Franklin*'s coral sand was not a filtering or purifying device within the meaning of heading 8421. *Id.* at 1341. The court based this conclusion upon its finding that the coral sand had two distinct uses: (1) reduction of bacteria and neutralization of chlorine in the water, *id.* at 1340-41; and (2) addition of "hardness," or water alkalinity, which, according to *Franklin*'s mar-

<sup>1</sup>Specifically, subheading 2106.90.99 covers "[p]reparations for the manufacture of beverages: (71) Containing high-intensity sweeteners (e.g., aspartame and/or saccharin); (72) Containing sugar derived from sugar cane and/or sugar beets; (73) Other; (75) Non-dairy coffee whiteners; (80) Other cream or milk substitutes; (85) Confectionary (including gum) containing synthetic sweetening agents (e.g., saccharin instead of sugar); (87) Herbal teas and herbal infusions comprising mixed herbs; (88) Flavored honey; (90) Other: Canned; (95) Other: Frozen; (97) Other: Containing sugar derived from sugar cane and/or sugar beets; (98) Other \* \* \* HTSUS, subheading 2106.90.99.

<sup>2</sup>On appeal, *Franklin* abandons its alternative claim for classification as "[c]oral and similar materials, unworked or simply prepared but not otherwise worked" under heading 0508, HTSUS.

keting materials, made the water healthier, *id.* at 1341.<sup>3</sup> According to the court, the first use qualified as purification or filtration under 8421, but the second did not. As the court stated, "[i]nsofar as the addition of hardness raises the alkalinity level of water, and thereby benefits the health of the consumers in ways other than those associated with the reduction of bacteria, \* \* \* the merchandise does not purify or filter in the sense required under heading 8421." *Id.* The court noted that because 8421 is a "use" provision, Franklin's coral sand must have been "chiefly used" to filter or purify in order to fall under the heading. *Id.* After examining Appellant's marketing materials, the court determined that Franklin had failed to provide any evidence from which one could infer that the coral sand's chief use was to purify. *Id.* As such, the court concluded that the coral sand was not properly classifiable under subheading 8421.21.00.

The court further analyzed the coral sand under heading 2106. It concluded that because the sand was added to and affected the properties of water that was ultimately ingested, it qualified as a food preparation. *Id.* at 1344. The court found that the coral sand steeped in the water in a manner similar to the dissolving process described in Explanatory Note 21.06(A) and therefore fell within the heading. *Id.* The court also based its holding upon its finding that Franklin's coral qualified as an "infusion" within the meaning of Explanatory Note 21.06(14). *Id.* at 1344 n.13. Within heading 2106, the court found that the coral sand was properly classified under subheading 2106.90.99 because no other subheading covered Appellant's goods more specifically. *Id.* at 1345. Because the court found that the subject merchandise was classifiable under only one of the suggested headings, it concluded that the case presented no relative specificity issue under General Rule of Interpretation ("GRI") 3. *Id.* at 1340.

Franklin timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

#### DISCUSSION

We review the Court of International Trade's grant of summary judgment without deference. *Mead Corp. v. United States*, 238 F.3d 1342, 1345 (Fed. Cir. Mar. 8, 2002). The proper scope and meaning of a tariff classification term is a question of law to be reviewed *de novo*, *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997), while determining whether the goods at issue fall within a particular tariff term as properly construed is a question of fact, *N. Am. Processing Co. v. United States*, 236 F.3d 695, 697 (Fed. Cir. 2001). We afford Customs' classification rulings deference in accordance with the principles set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001); *Mead*, 238 F.3d at 1346. Under *Skidmore*, a classification decision receives a measure of deference propor-

<sup>3</sup> As the court noted, "Arthur Franklin's marketing materials emphasize that water of a higher alkalinity may bring health benefits to the user, because the human diet generally tends to produce a sub-optimal acidity level in the body." *Id.* at 1341.

tional to its power to persuade. *Skidmore*, 323 U.S. at 140. Despite this deference, however, the court continues to "recogniz[e] its independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms." *Mead*, 238 F.3d at 1346 (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

The GRIs of the HTSUS and the Additional United States Rules of Interpretation guide the court's classification of goods imported into the United States. *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000). According to GRI 1, "classification shall be determined according to the terms of the headings and any relevant section or chapter notes \* \* \*." *Franklin*, 135 F. Supp. 2d at 1340 n.3. "Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). Under GRI 3(a), when goods are *prima facie* classifiable under two or more headings, the merchandise should be classified under the heading that provides the most specific description.

Absent legislative intent to the contrary, we construe HTSUS terms according to their common and commercial meanings, which are presumed to be the same. *N. Am. Processing*, 236 F.3d at 698. In construing a tariff term's common meaning, the court may rely on its own understanding of the term as well as upon lexicographic and scientific authorities. *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). The court may also refer to the Explanatory Notes accompanying a tariff subheading. *Id.* Although these notes do not constitute controlling legislative history, they are nonetheless intended to clarify the scope of the HTSUS subheadings and to offer guidance in their interpretation. *Id.*

#### A

##### SUBHEADING 8421.21.00

Franklin argues that the Court of International Trade erred when it concluded that Customs properly classified its coral sand under subheading 2106.90.99. Appellant asserts that its coral sand purifies within the meaning of heading 8421 because it removes unwanted constituents from water and therefore falls under the definition of "purify" set forth in *Noss Co. v. United States*, 588 F. Supp. 1408 (Ct. Int'l Trade 1984), *aff'd*, 753 F.2d 1052 (Fed. Cir. 1985), and *Deringer v. United States*, 656 F. Supp. 670 (Ct. Int'l Trade 1986), *aff'd*, 832 F.2d 592 (Fed. Cir. 1987). According to Franklin, these unwanted constituents are chlorine, bacteria, and softness. Finally, Franklin asserts that its coral sand works in precisely the same manner as a zeolite water softener, which is specifically covered by the Explanatory Notes accompanying subheading 8421.21. Franklin asserts that because its coral functions according to the same chemical principals as zeolite softeners, the sand should fall within the same tariff subheading.

The government responds that the Court of International Trade correctly affirmed Customs' classification of Franklin's coral under

2106.90.99. The government argues that Appellant's goods do not purify or filter within the meaning of heading 8421 because the coral sand's principal use is to raise the alkalinity of water, thereby making it harder and allegedly healthier for consumers. According to the government, the coral sand's antibacterial and chlorine-neutralizing effects are incidental to this principal use. The government distinguishes Franklin's merchandise from a zeolite water softener on the ground that while the specific purpose of a water softener is to remove hardness from water, the intended effect of Appellant's coral sand is to add hardness and alkalinity.

We agree with Franklin that its goods are properly classified under subheading 8421.21.00. In *Noss*, the Court of International Trade relied on several lexicographic sources to construe the tariff term "purify"<sup>4</sup> to mean "to make pure: as to clear from material defilement or imperfection; free from impurities or noxious matter. \* \* \* To free from admixture with foreign or vitiating elements; make clear or pure. \* \* \* [T]o remove unwanted constituents from a substance." 588 F. Supp. at 1412 (emphasis added) (internal citations omitted).

Under *Noss*, an imported good purifies if it removes *unwanted constituents* from a substance, regardless of what those unwanted constituents may be. The relative "purity" of the constituents themselves is immaterial. In *Deringer*, 656 F. Supp. at 671, for example, the Court of International Trade addressed the question of whether reverse osmosis maple sap concentrators qualified as filtering and purifying machinery under heading 661, TSUS.<sup>5</sup> Appellant *Deringer* argued that they did not because they freed the sap from an impurity in "the classical sense," the machines removed water, thereby concentrating the remaining sugar, minerals, and bacteria and resulting in an increasingly "impure" product. *Id.* Relying on *Noss*, the court rejected this argument, concluding that *Deringer's* goods purified within the meaning of the tariff term because they freed the sap from "extraneous matter," namely excess water. *Id.* at 672. As the court observed, "[w]hile excess water may not be an impurity in 'the classical sense,' it is clear from testimony that it is an 'unwanted constituent' in the raw maple sap used in making maple syrup." *Id.* As such, the court held that the concentrators purified within the meaning of the tariff classification. *Id.*

Franklin's coral sand functions exclusively to remove unwanted chlorine, bacteria, and acidity from water. Its principal use is therefore to purify within the meaning of subheading 8421.21.00. In holding otherwise, the Court of International Trade relied on a false distinction between the sand's use in eliminating chlorine and bacteria and in altering the water's pH. The court rejected Franklin's filtration/purification argument on the ground that "there is no evidence to indicate that the pH level of 'good' water is an 'imperfection,' or in any other way an 'un-

<sup>4</sup> The court noted that "filter" and "purify" could be used synonymously, 588 F. Supp. at 1413 n.4, but held that a device need not both purify and filter in order to fall within the tariff classification, *id.* at 1412.

<sup>5</sup> Heading 661, TSUS was replaced without relevant change by heading 8421, HTSUS.

wanted constituent' of the water itself, in the same way that bacteria or chlorine is." *Franklin v. United States*, 135 F. Supp. 2d 1336, 1341 (Ct. Int'l Trade 2001) (emphasis added). For purposes of heading 8421, however, the relevant inquiry is not whether the subject merchandise removes inherently unsalutary "imperfections" such as bacteria or chlorine. Instead, as in *Noss* and *Deringer*, the question is whether the goods at issue remove unwanted extraneous matter. *Noss*, 588 F. Supp. at 1412; *Deringer*, 656 F. Supp. at 672. While decisions of the Court of International Trade are not binding precedent on this court, *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1556 (Fed. Cir. 1988), we find the rationale set forth in these two cases persuasive. Because the principal use of Franklin's coral sand is to eliminate unwanted properties from water, it is properly classified under subheading 8421.21.00. Additionally, we note that the Court of International Trade relied in part on the marketing material's lack of emphasis on purifying and its reference to the healthful benefits of an increase in the body's pH level. We consider that these materials are not decisive either way, as they refer both to health and purification.

We further note that the coral sand uses a similar exchange of ions as that employed by a zeolite water softener, only in reverse. Zeolites act chemically to remove calcium and magnesium ions from hard water by adding sodium ions; Appellant's coral replaces hydrogen ions with calcium and magnesium ions, thereby rendering softer water "harder" or less acidic. In other words, both zeolites and Franklin's coral adjust the pH of water by a process of ionic exchange. As discussed above, zeolite water softeners are specifically covered by the Explanatory Notes accompanying subheading 8421.21. "While Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTS[US] subheadings." *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995). Here, we find that the coral sand's similarity to a zeolite water softener further supports our finding that the sand is properly classified under subheading 8421.21.00.

## B

### SUBHEADING 2106.90.99

Franklin argues that its coral sand was not properly classifiable as a food preparation under heading 2106 and that the Court of International Trade therefore erred in affirming Customs' classification. Appellant asserts that its product is not food because it is not taken into the system and does not supply nutrients to support life and growth. Instead, Appellant argues, the majority of the coral remains at the bottom of the glass while a small percentage goes into solution in order to change the chemical content of the water. Franklin relies heavily upon *Strauss v. United States*, 43 Cust. Ct. 136 (1959). According to Appellant, *Strauss* stands for the proposition that imported merchandise is not a food preparation if the consumer does not eat the entire product; ingesting a few of the goods' constituent elements is not enough.

The government responds that Appellant's merchandise is edible because it is specifically used to treat drinking water and because the elements imparted by the product are ultimately ingested by the consumer. According to the government, the Court of International Trade correctly found that the coral sand imparts hardness and alkalinity to the water in a manner similar to the dissolving process specified in the Explanatory Notes at 21.06(A). Therefore, the government argues, the court correctly affirmed the sand's classification under subheading 2106.90.99. Finally, the government distinguishes *Strauss* on the ground that unlike the bubble gum at issue in that case, the consumer is intended to ingest the hardness and alkalinity added to water treated with Appellant's coral sand.

As a preliminary matter, we note that GRI 3(a) is instructive. Even assuming *arguendo* that Customs was correct when it found that Franklin's coral sand was *prima facie* classifiable as a "[f]ood preparatio[n] not elsewhere specified or included" under heading 2106, heading 8421 provides a more specific description of the subject merchandise. Consequently, Appellant's coral is properly classified under that heading in general and under subheading 8421.21.00 in particular. GRI 3(a); *Orlando Foods Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998) ("[W]hen a product is *prima facie* classifiable under two or more headings, '[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.'" (quoting GRI 3(a))).

We further agree with Franklin, however, that the coral sand is not a food preparation at all within the meaning of heading 2106. In *Strauss*, 43 Cust. Ct. at 141, the United States Customs Court held that bubble gum was not "an edible preparation" under the Tariff Act. Before the court, the government argued that the tariff classification should be construed to cover gum because the product contained sugar and dextrose syrup which were swallowed as the gum was chewed. *Id.* at 140. According to the government, bubble gum's status as food depended upon whether its component parts were edible. The court rejected this argument. As the court stated:

The common meaning to be applied is that of the imported preparation, not of its several components. While the sugars and syrup in the preparation "bubble gum" are nutritious when swallowed, and in that sense they (the sugars and syrup) are edible, there is not such evidence as to the preparation "bubble gum." To the contrary, it appears that bubble gum is not customarily eaten and swallowed.

*Id.* at 140. Similarly, nothing in the instant record indicates that one would eat one of Franklin's one-gram bags of coral sand. Even if the goods' component parts, namely calcium carbonate or, as the government argues, alkalinity, are ingested, this is not enough to bring Franklin's product within heading 2106. Although *Strauss* is not binding precedent on this court, we find its rationale persuasive.



Of course, the analysis cannot end here, because one typically would not eat a bag of tea, either. As discussed above, the Court of International Trade relied heavily upon Explanatory Note 21.06(14), which provides for the inclusion within heading 2106 of "[p]roducts consisting of a mixture of plants or parts of plants \* \* \* which are not consumed as such, but which are of a kind used for making herbal infusions or herbals 'teas'. \* \* \*" *Franklin v. United States*, 135 F. Supp. 2d 1336, 1344 n.13 (Ct. Int'l Trade 2001). The court found that although Appellant's coral is not a plant but an animal, it was accurately described as an "infusion." *Id.* It based this conclusion on its finding that like tea, one "steep[ed]" the coral sand in water, *id.* at 1344, and thereby "impregnate[d] the liquid with its properties," specifically hardness, alkalinity, and the chlorine-neutralizing effects of the L-ascorbic acid, *id.* at 1344 n.13 (quoting 7 Oxford English Dictionary 953).

This finding misconstrues the processes that occur when Franklin's coral sand is placed in water. Unlike tea, the subject merchandise is not consumed as a food. It purifies the water. Moreover, the purification heading 8421.21.00 is more specific than the food preparation heading 2106.90.99. Accordingly, we find that the subject merchandise is not correctly classified as a "[f]ood preparatio[n] \* \* \* other" within the meaning of subheading 2106.90.99.

#### CONCLUSION

Although we are mindful of Customs' expertise and that of the Court of International Trade in classifying imported articles, for the reasons stated above, we conclude that Franklin's coral sand is not a food preparation. The classification ruling at issue here lacks the power to persuade under the principles set forth in *Skidmore*. Because the imported articles are correctly classified under subheading 8421.21.00, the decision of the Court of International Trade is reversed.

#### REVERSED

RHP BEARINGS LTD., NSK BEARINGS EUROPE LTD., AND NSK CORP.,  
PLAINTIFFS-APPELLANTS v. UNITED STATES, DEFENDANT-APPELLEE, AND  
THE TORRINGTON CO., DEFENDANT-APPELLEE

Appeal No. 01-1160

(Decided April 30, 2002)

*Matthew P. Jaffe*, Lipstein, Jaffe & Lawson, LLP, of Washington, DC argued for plaintiffs-appellants. With him on the brief were *Robert A. Lipstein* and *Grace W. Lawson*.

*Velta A. Melnbrensis*, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant United States. With her on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; and *David M. Cohen*, Director. Of counsel on the brief were *John D. McInerney*, Acting Chief Counsel, *Berniece A. Browne*, Senior Counsel; and *David R. Mason*, Attorney, Office of Chief Counsel for Import Administration, Department of Commerce, Washington, DC.

*Geert De Prest*, Stewart and Stewart, of Washington, DC, argued for defendant-appellee The Torrington Company. With him on the brief were *Terence P. Stewart* and *Lane S. Hurewitz*. Of counsel was *Wesley K. Caine*.

Appealed from: United States Court of International Trade  
Senior Judge NICHOLAS TSOUCALAS

Before NEWMAN, SCHALL, and BRYSON, Circuit Judges.

SCHALL, Circuit Judge.

RHP Bearings Ltd. ("RHP Bearings"), NSK Bearings Europe Ltd. ("NSK Bearings"), and NSK Corporation (collectively, "RHP-NSK") appeal the final decision of the United States Court of International Trade that affirmed the final antidumping duty determination of the United States Department of Commerce, International Trade Administration ("Commerce"), in *Antifriction Bearings (Other Than Tapered Rolling Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 63 Fed. Reg. 33,320 (Dep't Commerce June 18, 1998). *RHP Bearings Ltd. v. United States*, 120 F. Supp. 2d 1116 (Ct. Int'l Trade 2000). The Court of International Trade held that, in its determination of the antidumping duty to be applied to antifriction bearings imported into the United States by RHP-NSK during the period covered by the *Final Results*, Commerce had not erred in computing (i) the constructed export price of the imported bearings, pursuant to 19 U.S.C. § 1677a (1999)<sup>1</sup>, or (ii) the normal value of the bearings, pursuant to 19 U.S.C. § 1677b. *RHP Bearings*, 120 F. Supp. 2d at 1131. Specifically, the court determined that Commerce did not err when, in computing the constructed export price of the subject bearings, it declined to apply the special rule of 19 U.S.C. § 1677a(e), that comes into play in the circumstances where value is added to merchandise after importation. *RHP Bearings*, 120 F. Supp. 2d

<sup>1</sup> Because the administrative review at issue was initiated after January 1, 1995, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub.L. No. 103-465, 108 Stat. 4809 (1994) (effective January 1, 1995). Therefore, unless otherwise indicated, statutory citations are to the 2000 version of the United States Code. No relevant amendments have been made to the pertinent statutory provisions since the URAA amendments.

at 1126. The court also held that, when using constructed value to determine the normal value of the subject bearings, *see* 19 U.S.C. § 1677b(e), Commerce did not err in computing the profit component of constructed value.<sup>2</sup> *RHP Bearings*, 120 F. Supp. 2d at 1126-27.

We affirm the decision of the Court of International Trade sustaining Commerce's determination of constructed export price. We do so because we conclude that, under 19 U.S.C. § 1677a(e), Commerce had discretion as to whether to apply the special rule, and RHP does not, in the alternative, challenge Commerce's calculation as otherwise unreasonable or unsupported by substantial evidence. However, we vacate the court's decision sustaining Commerce's calculation of the profit component of constructed value and remand the case for further proceedings. That result is mandated by our recent decision in *SKF USA Inc. v. United States*, 263 F.3d 1369 (Fed. Cir. 2001). There, we vacated the decision of the Court of International Trade and remanded the case with the instruction that Commerce (i) explain its methodology for calculation of constructed value profit (identical to Commerce's constructed value profit calculation challenged in this appeal), and (ii) explain why that methodology comported with statutory requirements. We thus affirm-in-part, vacate-in-part, and remand.

## BACKGROUND

### I.

The antidumping law provides that if Commerce determines that imported merchandise is being sold in the United States "at less than its fair value" and the practice is causing material injury to a domestic industry, "there shall be imposed upon such merchandise an antidumping duty." 19 U.S.C. § 1673. The antidumping duty is "in an amount equal to the amount by which the normal value exceeds the export price \* \* \* for the merchandise." 19 U.S.C. § 1673. "Normal value" generally is the price at which the "subject merchandise"<sup>3</sup> is sold in the exporting country. *See* 19 U.S.C. § 1677b. "Export price" generally is the price at which the subject merchandise is first sold in the United States. *See* 19 U.S.C. § 1677a.

#### A. Determining Constructed Export Price.

When a foreign producer or exporter sells a product to an affiliated purchaser in the United States, the antidumping law provides for the use of a "constructed export price" as the "export price" for purposes of computing the dumping margin (the difference between normal value and export price). *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1303 (Fed. Cir. 2001). Constructed export price is "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States \* \* \* to a purchaser not affiliated with the producer or exporter,

<sup>2</sup>The Court of International Trade resolved several other issues regarding adjustments to constructed export price and normal value; they are not before us on appeal.

<sup>3</sup>"Subject merchandise" is defined as "the class or kind of merchandise that is within the scope of an investigation." 19 U.S.C. § 1677(25).

as adjusted under subsections (c) and (d) of [19 U.S.C. § 1677a].” 19 U.S.C. § 1677a(b).

Under section 1677a(c), the price used to establish constructed export price is subject to specified increases and reductions. Further adjustments to constructed export price are set forth in section 1677a(d). Pursuant to 19 U.S.C. § 1677a(d)(2), “the price used to establish constructed export price shall also be reduced by \* \* \* the cost of any further manufacture or assembly (including additional material and labor), except in circumstances described in subsection (e) of this section.”

Subsection (e) of section 1677a sets forth a further method of calculating constructed export price when value is added to merchandise after importation:

**(e) Special rule for merchandise with value added after importation.**

Where the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, the administering authority shall determine the constructed export price for such merchandise by using one of the following prices if there is a sufficient quantity of sales to provide a reasonable basis for comparison and the administering authority determines that the use of such sales is appropriate:

- (1) The price of identical subject merchandise sold by the exporter or producer to an unaffiliated person.
- (2) The price of other subject merchandise sold by the exporter or producer to an unaffiliated person.

If there is not a sufficient quantity of sales to provide a reasonable basis for comparison under paragraph (1) or (2), or the administering authority determines that neither of the prices described in such paragraphs is appropriate, then the constructed export price may be determined on any other reasonable basis.

19 U.S.C. § 1677a(e). While they both address the situation in which value is added to merchandise after importation, sections 1677a(d)(2) and 1677a(e) represent quite different approaches to calculating constructed export price. Section 1677a(d)(2) provides for the price used to calculate constructed export price being reduced by the cost of further processing. Section 1677a(e), on the other hand, provides for calculating constructed export price without reference to the price at which the further manufactured goods are sold to an unaffiliated purchaser.

***B. Determining Normal Value.***

As noted above, the antidumping duty for particular merchandise is the amount by which the merchandise's normal value exceeds its export price or, when applicable, its constructed export price. Typically, normal value is calculated within a reasonable time of the sale providing a basis for the export price. See 19 U.S.C. § 1677b(a)(1)(A). Normal value is “the price at which the foreign like product is first sold \* \* \* for consumption in the exporting country, in the usual commercial quantities and in the

ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). However, in circumstances where an insufficient quantity of sales has occurred in the exporting country, or the market in the exporting country does not otherwise provide a comparable price, Commerce may look to third country sales of the subject merchandise to determine normal value. *See* 19 U.S.C. §§ 1677b(a)(1)(C) and 1677b(a)(1)(B)(ii). The antidumping law provides that, in such circumstances, Commerce may utilize "the price at which the foreign like product is so sold (or offered for sale) for consumption in a country other than the exporting country or the United States." 19 U.S.C. § 1677b(a)(1)(B)(ii).

In the alternative, section 1677b(a)(4) provides that where normal value cannot be determined under section 1677b(a)(1)(B)(i), then, notwithstanding section 1677b(a)(1)(B)(ii), "the normal value of the subject merchandise may be the constructed value of that merchandise." Constructed value is calculated according to 19 U.S.C. § 1677b(e), which provides in pertinent part as follows:

**(e) Constructed value.**

For purposes of this subtitle, the constructed value of imported merchandise shall be an amount equal to the sum of—

(1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise \* \* \*;

(2)(A) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or

(B) if actual data are not available with respect to the amounts described in subparagraph (A), then—

(i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,

(ii) the weighted average of the actual amounts incurred and realized [as described in part (i)] by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or

(iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method \* \* \*; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject

merchandise in condition packed ready for shipment to the United States. \* \* \*

19 U.S.C. § 1677b(e).

As can be seen, constructed value is not the actual price at which subject merchandise is offered for sale in the exporting country. Rather, it is a "proxy" for a sales price, based on an amalgamation of component costs. See *SKF*, 263 F.3d at 1373. The statute provides four separate methods for calculating the general administrative costs and profit components of the constructed sum. 19 U.S.C. § 1677b(a)(e)(2). Actual data from the exporter's manufacture and sale of foreign like products in the exporting country is preferred. See 19 U.S.C. § 1677b(e)(2)(A) and (B). Only if such data is unavailable, as where there are no home-market sales of foreign like products, or only sales below-cost, is Commerce to utilize one of the remaining three methods, set forth in section 1677b(e)(2)(B). *SKF*, 263 F.3d at 1374 & n.4. We turn now to the facts of this case.

## II.

This case concerns the eighth administrative review of the antidumping duty order on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof, covering the period May 1, 1996, through April 30, 1997. *RHP Bearings*, 120 F. Supp. 2d at 1118.

RHP Bearings and NSK Bearings manufacture and sell bearings in the United Kingdom, some of which are sold to a United States affiliate, NSK Corporation. During the period covered by the review, both made sales to their U.S. affiliate. As part of the administrative review, Commerce sent RHP-NSK a questionnaire requesting information concerning the quantity of sales of the subject bearings, the home market, any relevant third-country markets, the U.S. market, costs of production, and constructed value.<sup>4</sup> This information was sought so that Commerce could calculate normal value.

Included in the questionnaire was a section A.8, entitled "Further Manufacture or Assembly in the United States." The section was directed to "subject merchandise exported to the United States and changed in value or physical condition ('further manufacture') prior to delivery to the first unaffiliated customer in the United States." The section requested that, for the period of review, the respondent provide the weighted-average net price charged to the affiliated importer for each product included in the review that was further manufactured, as well as the weighted-average net price charged to unaffiliated U.S. customers for each further manufactured final product. *RHP Bearings*, 120 F. Supp. 2d at 1121. This information was sought to enable Commerce to determine whether the value added by further manufacture substantially exceeded the value of the subject merchandise that had been further processed. Commerce explained: "If you do not believe that the

<sup>4</sup> Throughout the review, Commerce treated the affiliated corporations as a single entity (collectively "RHP-NSK") for the purpose of determining antidumping duties.



value-added in the United States exceeds substantially the value of the subject merchandise that has been further processed, you need not provide this information." *See id.* RHP-NSK did not submit this data. *See id.*

The questionnaire also contained a Section E, entitled "Cost of Further Manufacture or Assembly Performed in the United States." This section requested information necessary for calculating constructed export price in the situation where it was not believed that the value added by further manufacture exceeded substantially the initial import value. Responding to Section E, RHP-NSK provided information relating to further manufacturing in the United States; this included information relating to raw materials, labor, electricity, and equipment. *See id.* at 1120-21. RHP-NSK furnished in addition an analysis of the costs of the above inputs, as well as a fairly thorough description of its accounting practices and financial methods. *See id.* at 1120. Commerce used the data provided by RHP-NSK in its questionnaire to calculate the constructed export price of the RHP-NSK bearings sold during the period of review. *See id.* at 1121.

Commerce published the preliminary results of the administrative review on February 9, 1998. *See* 63 Fed. Reg. 6512-03. In the preliminary results, Commerce stated that, except in the cases of RHP-NSK and one other manufacturer, it had employed the special rule for further manufactured goods in calculating constructed export price, *see* 19 U.S.C. § 1677a(e). 63 Fed. Reg. at 6,515. According to Commerce, this approach was consistent with Commerce's intention to apply the special rule in all cases where "the value added is likely to exceed substantially the value of the subject merchandise." *Id.* The information supplied by firms responding to Section A.8 of the questionnaire was used to determine whether this criterion was met. Commerce determined that the threshold for use of the special rule would be crossed when value added during further manufacturing in the United States contributed to a minimum of 65% of the price charged to the first unaffiliated customer for the manufactured product. *Id.* In the case of RHP-NSK, Commerce calculated the constructed export price pursuant to 19 U.S.C. § 1677a(d)(2) by deducting costs of further manufacturing described in RHP-NSK's response to Section E of the questionnaire. *Id.* Commerce did not calculate the relative value of RHP-NSK's further manufacturing. However, RHP-NSK argues, and Commerce does not dispute, that the value of such further manufacturing exceeded Commerce's 65% threshold.

With respect to the normal value calculation, *see* 19 U.S.C. § 1677b, Commerce determined, based upon responses to its questionnaire, that RHP-NSK and several other exporting firms could not base normal value on home market sales in the manner contemplated by 19 U.S.C. § 1677b(a)(1)(B)(i). Commerce explained that a substantial portion of home market sales for RHP-NSK and the several other manufacturers had been determined to be below the cost of production and that, there-

fore, pricing data from home market sales would not be used in determining normal value. *Preliminary Results*, 63 Fed. Reg. at 6516. In arriving at this determination, Commerce relied upon data for all identical bearings, and bearings within the same family.<sup>5</sup> *Id.* Having determined that normal value could not be calculated under section 1677b(a)(1)(B)(i), Commerce turned to the constructed value methodology of 19 U.S.C. § 1677b(e). In arriving at the profit component to be used in the constructed value calculation, Commerce utilized 19 U.S.C. § 1677b(e)(2)(A), which looks to profits in connection with the production and sale of a foreign like product. *Final Results*, 63 Fed. Reg. 33,320 at 33,333. However, in that regard, Commerce did not employ the same definition of "foreign like product" that it had used in the price-based calculations that it had initially made under § 1677b(a)(1)(B)(i) (identical bearings and bearings within the same family). Rather, it referenced "all [anti-friction bearing] models within the order-specific subject merchandise that were reported in the foreign-market sales databases as potential matches to U.S. sales." *Id.* In other words, Commerce aggregated data for all foreign like products for all bearing families under review. See *RHP Bearings*, 120 F. Supp. 2d at 1126.

In response to Commerce's *Preliminary Results*, RHP-NSK, along with other interested parties, provided comments. In its comments, RHP-NSK argued that, in its case, Commerce had erred in not using the special rule of 19 U.S.C. § 1677a(e) in computing constructed export price. *Final Results* at 33,338. RHP-NSK suggested that the value added by further processing to its exported bearings exceeded Commerce's 65% threshold and that the statute therefore required that Commerce use the special rule. *Id.* Commerce rejected this argument in the *Final Results*, stating that the decision to apply the special rule was discretionary. According to Commerce:

the special rule for further manufacturing exists in order to reduce the Department's administrative burden. \* \* \* [Section 1677a(e)] of the Act [] provides that the Department need only apply the special rule where it determines that the use of such alternative calculation methodologies is appropriate. We retain the authority to refrain from applying the special rule in those situations where the value added, while large, is simple to calculate.

*Final Results* at 33,338.

Regarding Commerce's calculation of the profit component of constructed value for purposes of arriving at a normal value for the bearings under review, several interested exporters responded by criticizing Commerce's use of aggregated data from all families of bearings. Specifically, it was argued that giving "foreign like product" two different meanings when applying the provisions for determining normal value was improper and contrary to the definition of the term "foreign like

<sup>5</sup> Bearing "family" is defined in the *Preliminary Results*: "a bearing family consists of all bearings within a class or kind of merchandise that are the same in the following physical characteristics: load direction, bearing design, number of rows of rolling elements, precision rating, dynamic load rating, outer diameter, inner diameter, and width." *Preliminary Results* at 6516.

product" in 19 U.S.C. § 1677(16). *Final Results* at 33,334.<sup>6</sup> In response, Commerce stated that

an aggregate calculation that encompasses all foreign like products under consideration for normal value represents a reasonable interpretation of [19 U.S.C. § 1677b(e)(2)(A)]. Moreover, we believe that, in applying the preferred method for computing CV profit under [19 U.S.C. § 1677b(e)(2)(A)], the use of aggregate data results in a reasonable and practical measure of profit that we can apply consistently in each case.

*Id.* at 33,333.

Pursuant to 28 U.S.C. § 1581(c), RHP-NSK challenged Commerce's *Final Results* determinations before the Court of International Trade. The Torrington Company intervened as a defendant in the litigation.

### III.

Upon the administrative record, the Court of International Trade, upheld Commerce's anti-dumping determinations in the *Final Results*. *RHP Bearings*, 120 F. Supp. 2d 1116. The court agreed with the government that, under 19 U.S.C. § 1677a(e), Commerce had discretion in deciding whether to apply the special rule. *Id.* at 1125. In doing so, it relied on the language of section 1677a(e) which states that the special rule may be used "if \* \* \* the administering authority determines that the use of such sales is appropriate." *Id.* The court concluded that Commerce had properly determined that the rule is inappropriate "in those situations where the value added, while large, is simple to calculate." *Id.* at 1126 (quoting *Final Results* at 33,338).

The Court of International Trade also upheld Commerce's use of all foreign like products under consideration for purposes of calculating the profit component of constructed value in determining normal value. *RHP Bearings*, 120 F. Supp. 2d at 1126-27. The court relied upon a prior Court of International Trade decision, *RHP Bearings Ltd. v. United States*, 83 F. Supp. 2d 1322 (Ct. Int'l Trade 1999). In that case, the court held that an identical method of calculating constructed value profit, which used aggregate data of all foreign like products under consideration in order to determine normal value under 19 U.S.C. § 1677b(e)(2)(A), was consistent with the antidumping statute. *RHP Bearings*, 120 F. Supp. 2d at 1126.

RHP-NSK has timely appealed the Court of International Trade's determination on these two issues. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1295(a)(5).

### DISCUSSION

#### I.

"When reviewing anti-dumping determinations made by Commerce, this court applies anew the standard of review applied by the Court of

<sup>6</sup> As seen above, Commerce concluded that RHP-NSK's home market sales of foreign like product were below cost and therefore could not provide a basis for normal value. In reaching that conclusion, Commerce used data from sales of identical bearings and bearings within the same bearing family—a definition of foreign like product not followed in Commerce's later calculation of the constructed normal value.

International Trade in its review of the administrative record." *FLLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1031 (Fed. Cir. 2000). We uphold Commerce's determination unless it is "unsupported by substantial evidence on the record or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

On appeal, RHP-NSK renews its challenge to Commerce's determination of constructed export price and normal value. Specifically, RHP-NSK takes issue with Commerce's determination to adjust the price used to arrive at constructed export price by reducing that price by the cost of further manufacture or assembly, as contemplated by 19 U.S.C. § 1677a(d)(2). According to RHP-NSK, Commerce should have followed the approach of the special rule set forth in 19 U.S.C. § 1677a(e). As seen above, that section provides that, in specified circumstances, constructed export price is to be constructed from analogous sales of subject merchandise. RHP-NSK contends that the specified circumstances existed in this case. As far as normal value is concerned, RHP-NSK challenges Commerce's determination to calculate the profit component of constructed value under 19 U.S.C. § 1677b(d)(2)(A) using "aggregate data" from reported home market sales of anti-friction bearings.

RHP-NSK's contentions implicate two issues of statutory interpretation. The first is whether section 1677a(e), the "Special Rule for Merchandise With Value Added After Importation," particularly mandates its use to calculate constructed export price in circumstances where the value added by additional manufacture substantially exceeds that of the subject merchandise. The second issue of statutory interpretation concerns Commerce's treatment of the term "foreign like product" as used in section 1677b(e)(2)(A) to calculate constructed value profit.

## II.

We review questions of statutory interpretation without deference. *U.S. Steel Group v. United States*, 225 F.3d 1284, 1286 (Fed. Cir. 2000). In reviewing an agency's construction of the statute that it administers, we address two questions as required by the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, we and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, Congress has not spoken directly on the issue, we address the second question of whether the agency responsible for filling a gap in the statute has rendered an interpretation that "is based on a permissible construction of the statute." *Id.*; see also *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1308 (Fed. Cir. 2001).

## III.

### A. The Special Rule Issue.

RHP-NSK argues that a reading of 19 U.S.C. §§ 1677a(d)(2) and (e) compels the conclusion that Commerce must apply the special rule whe-

never "the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise." 19 U.S.C. § 1677a(e). In making this argument, RHP-NSK points to section 1677a(d)(2), which states that the price used to establish constructed export price shall be reduced by "the cost of any further manufacture or assembly (including additional material and labor), *except* in circumstances described in subsection (e) of this section." (emphasis added). According to RHP-NSK, the word "except" is an unambiguous expression of the intent of Congress that section 1677a(d)(2) is not to apply in the circumstances described in subsection (e). RHP-NSK also argues that a reading of section 1677a(e) makes clear that application of the special rule is mandatory once it has been determined that the value of the imported product is substantially outweighed by the value added by further manufacturing in the United States. RHP-NSK bases this on the inclusion of the word "shall" in the statute:

Where the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, the administering authority *shall* determine the constructed export price for such merchandise by using one of the following prices. \* \* \*

19 U.S.C. § 1677a(e) (emphasis added).

The government and Torrington respond that the statute confers broad discretion upon Commerce to determine whether to apply the special rule. Both parties argue that RHP-NSK ignores the parts of the statute quoted below. They contend that these provisions support the proposition that Commerce has discretion in selecting a methodology for the calculation of constructed export price:

[T]he administering authority shall determine the constructed export price for such merchandise by using one of the following prices *if* there is a sufficient quantity of sales to provide a reasonable basis for comparison *and the administering authority determines that the use of such sales is appropriate*:

(1) The price of identical subject merchandise sold by the exporter or producer to an unaffiliated person.

(2) The price of other subject merchandise sold by the exporter or producer to an unaffiliated person.

*If there is not a sufficient quantity of sales to provide a reasonable basis for comparison under paragraph (1) or (2), or the administering authority determines that neither of the prices described in such paragraphs is appropriate, then the constructed export price may be determined on any other reasonable basis.*

19 U.S.C. § 1677a(e) (emphasis added). According to the government and Torrington it is clear from the statutory language that application of the special rule is not mandatory, and is clearly subject to the discretion of Commerce.

The parties' contentions squarely frame the issue before us. The first part of 19 U.S.C. § 1677a(e) states the circumstances in which the spe-

cial rule comes into play: "[w]here the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise." Neither Commerce nor Torrington alleges that such circumstances do not exist here. Therefore, the question we must answer is whether, when the triggering circumstances exist, section 1677a(e) requires Commerce to compute constructed export price using one of the two methodologies set forth in section 1677a(e), or whether, when such circumstances exist, Commerce has discretion under the statute to calculate constructed export price in the manner provided in sections 1677a(c) and (d), which is what Commerce did in this case.

Turning to the first prong of the *Chevron* analysis, we conclude that Congress "has directly spoken to the precise question at issue" in this case: whether, when the triggering circumstances set forth in 19 U.S.C. § 1677a(e) are present, Commerce has discretion to apply or not to apply the special rule of section 1677a(e). Specifically, we conclude that Congress has directly expressed the intent to allow Commerce to determine, when the triggering circumstances of section 1677a(e) are present, whether application of the special rule is appropriate. Stated another way, Congress has directly expressed the intent to allow Commerce to exercise its discretion when faced with the circumstances described in section 1677a(e).

Turning to the statutory language, we note that even when the circumstances set forth in section 1677a(e) are present, the prices in sections 1677a(e)(1) and (2) are not used for constructed export price unless two further conditions are met: (1) there is a "sufficient quantity" of sales of the kind described in subsections (1) and (2) "to provide a reasonable basis for comparison" and (2) Commerce "determines that the use of such sales is appropriate." 19 U.S.C. § 1677a(e). At the same time, the final section of section 1677a(e) states that if Commerce determines that neither of the prices described in paragraphs (1) or (2) of subsection (e) is appropriate, "then the constructed export price may be determined on any other reasonable basis." *Id.* We do not think that the language of the statute could present a clearer grant of discretion to Commerce.

The legislative history also evidences the intent of Congress to make the application of the special rule discretionary. It explains that the chief purpose of Congress in creating the special rule was to ease administrative burden. According to the "Statement of Administrative Action" ("SAA") from the URAA, HR Doc. No. 316, 103 Cong., 2d Sess. (1994), Vol. 1:

New section [1677a](e) establishes a simpler and more effective method for determining export price in situations where an affiliated importer adds value to subject merchandise after importation. For example, if roller chain subject to an antidumping order is imported by an affiliated importer for incorporation into a motorcycle which then is sold to an independent party, there would be an enormous



burden on Commerce if it were required to "back out" from the price of the motorcycle all of the value added in the United States to work back to the constructed export price of the roller chain. \* \* \* To avoid imposing an unnecessary burden on Commerce, section [1677a](e) authorizes Commerce to determine export price based on alternative methods. \* \* \*

SAA, HR Doc. No. 316, at 825-26 (emphasis added).<sup>7</sup> It is clear from this passage that Congress did not intend for the special rule to dictate to Commerce a particular method for calculating constructed export price. Rather, the special rule was meant to simplify what was considered a rather complicated analysis by offering alternatives. The statutory language and the SAA compel the conclusion that the special rule is, as Commerce has asserted, a discretionary provision.

Having concluded that section 1677a(e) gives Commerce discretion in determining whether the special rule should be applied, our *Chevron* inquiry is at an end. The next question we might expect to address is whether Commerce acted reasonably in exercising that discretion. See *AK Steel Corp. v. United States*, 192 F.3d 1367, 1371 (Fed. Cir. 1999) ("[O]ur analysis is not whether we agree with Commerce's conclusions, nor whether we would have come to the same conclusions reviewing the evidence in the first instance, but only whether Commerce's determinations were reasonable."); *United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996) ("Thus, the question in this case is not whether we agree with the Commission's decision, nor whether we would have reached the same result as the Commission had the matter come before us for decision in the first instance. By statute, Congress has allocated to the Commission the task of making these complex determinations. Ours is only to review those decisions for reasonableness."). In this case, however, RHP-NSK relies solely on its argument that, whenever the triggering circumstances are present, section 1677a(e) mandates application of the special rule. RHP-NSK does not argue that, assuming Commerce has discretion, it nevertheless acted unreasonably in this case. Accordingly, as far as the special rule is concerned, the only thing left for us to do is affirm the conclusion of the Court of International Trade.

#### *B. Calculation of Normal Value.*

As seen above, Commerce resorted to a constructed value methodology in determining normal value for purposes of its analysis in the eighth administrative review. See 19 U.S.C. § 1677b(a)(4). RHP-NSK contends that, in that context, Commerce's use of aggregate data for all foreign like products to calculate the profit component of constructed value was contrary to 19 U.S.C. § 1677b(e)(2)(A), which refers only to "sale of a foreign like product." In the alternative, RHP-NSK argues that Com-

<sup>7</sup> The importance of the SAA in interpreting the URAA enactments is made clear in 19 U.S.C. § 3512(d), which states that "[t]he statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." See also *Micron Tech.*, 249 F.3d at 1309.

merce's use of aggregate data for "foreign like product" in section 1677b(e)(2)(A) conflicts with Congress's definition of the term in 19 U.S.C. § 1677(16). It asserts that because Congress created a hierarchy of preferred definitions for "foreign like product" in section 1677(16), Commerce is required to use a consistent definition throughout its application of the antidumping provisions. In other words, if Commerce determines that it can make a satisfactory determination as to "foreign like product" for the purpose of calculating normal value based upon the first definition of the term, *see* 19 U.S.C. § 1677(16)(A), then Commerce should apply that definition throughout the normal value calculation. However, as discussed above, in going through the process of calculating normal value, Commerce used the definition "identical bearings and bearings of the same family" for foreign like products as a basis for its price based calculation under 19 U.S.C. § 1677b(a)(1)(B)(i) and later abandoned this definition in favor of aggregate data for all foreign like products under consideration in its constructed value profit calculation under 19 U.S.C. § 1677b(e)(2)(A). RHP-NSK argues on appeal that this interpretation of sections 1677b(e)(2)(A) and 1677(16) was arbitrary and capricious.

The same issue was presented recently in *SKF USA Inc. v. United States*, 263 F.3d 1369 (Fed. Cir. 2001). In *SKF*, another bearing manufacturer who was subject to Commerce's eighth administrative review raised the identical issue that is presented here—whether the term "foreign like product" should be applied consistently for the price-based calculation of normal value under 19 U.S.C. § 1677b(a)(1)(b)(i) and the calculation of the profit component of constructed value as a substitute for normal value under 19 U.S.C. § 1677b(e)(2)(A). *Id.* at 1376. We stated that where Congress had used the term "foreign like product" in several sections throughout the antidumping act, and specifically defined the term in 19 U.S.C. § 1677(16), we would presume that Congress intended that the term have the same meaning in each reference. *Id.* at 1382. In *SKF*, as in this case, Commerce argued that resort to the aggregate data definition of "foreign like product" in section 1677(16) was reasonable in the context of a constructed value profit calculation under § 1677b(e) even though it had not used that definition in calculating normal value under § 1677b(a)(1)(B)(i). We noted, however, that Commerce had not explained its justification for inconsistent use of the term in its analysis. We held that "[w]ithout an explanation sufficient to rebut th[e] presumption [that terms are meant to be used consistently throughout a statute], Commerce cannot give the term "foreign like product" a different definition (at least in the same proceeding) when making the price determination and in making the constructed value determination." *Id.*

We therefore concluded that Commerce's actions were arbitrary, relying on the decision of the District of Columbia Circuit in *Transactive Corp. v. United States*, 91 F.3d 232, 237 (1996), for the proposition that "an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *See SKF*, 263 F.3d at

1382. We vacated the decision of the Court of International Trade that had sustained Commerce's determination and remanded the case for Commerce to explain its use of multiple foreign like products in its calculations. *Id.* at 1382. In light of our decision in *SKF*, we vacate the judgment of the Court of International Trade with respect to Commerce's constructed value profit calculations and remand for further proceedings on that issue.

#### CONCLUSION

For the foregoing reasons, the decision of the Court of International Trade is

#### COSTS

Each party shall bear its own costs.

**AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED.**

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XEROX CORP., PLAINTIFF-APPELLANT v.  
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01-1124

(Decided May 6, 2002)

*John M. Peterson*, Neville, Peterson & Williams, of New York, New York, argued for plaintiff-appellant. With him in the brief were *George W. Thompson* and *Curtis W. Knauss*. *James A. Curley*, Attorney, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, Department of Justice, of Washington, DC; and *Joseph I. Liebman*, Former Attorney in Charge, International Trade Field Office.

Appealed from: United States Court of International Trade  
*Judge* THOMAS J. AQUILINO, JR.

Before MAYER, *Chief Judge*, RADER and GAJARSA, *Circuit Judges*.

MAYER, *Chief Judge*.

Xerox Corporation appeals the judgment of the Court of International Trade dismissing its appeal from a formal protest with the U.S. Customs Service for lack of subject matter jurisdiction. *Xerox Corp. v. United States*, 118 F. Supp. 2d 1353 (Ct. Int'l Trade 2000). Because ministerial errors by the Customs Service in its administration of antidumping duty orders may be proper subjects of Customs protests and jurisdiction was proper, we reverse and remand.

#### BACKGROUND

In 1994 and 1995, Xerox Corporation ("Xerox") imported shipments of rubber and plastic feed belts from Japan to be used for carrying paper

across the light-platen or scanner-platen of photocopiers. Both entry summaries for the belts included a reference to the *Antidumping Duty Order of Sales at Less Than Fair Value; Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Japan*, 54 Fed. Reg. 25,314 (June 14, 1989). The order covered "industrial belts used for power transmission \* \* \* in part or wholly of rubber or plastic, and containing textile fiber (including glass fiber) or steel wire, cord or strand." *Id.* Both entries were liquidated in June of 1996.

Pursuant to the antidumping duty order, the Customs Service ("Customs") levied a 93.16 percent ad valorem duty on the belts. Xerox challenged the imposition of the duty by filing a timely formal protest with Customs under 19 U.S.C. § 1514(a)(2). Customs denied the protest, and Xerox appealed to the Court of International Trade under 28 U.S.C. § 1581(a). Xerox argued to the court that its belts are not encompassed by the antidumping duty order because they are neither used for power transmission, nor are they reinforced. And because the belts are clearly outside the scope of the order, Customs made a ministerial error in administering the order and Xerox is due a refund of the duty deposit.

The court stated that the proper remedy for such an error is not a Customs protest, but a scope determination by the Department of Commerce ("Commerce") under 19 U.S.C. § 1516a(a)(2)(B)(vi) as to whether the subject merchandise is described in the order. Such a scope determination would then be appealable to the court under 28 U.S.C. § 1581(c). The court dismissed for lack of subject matter jurisdiction. Xerox filed this timely appeal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

#### DISCUSSION

Jurisdiction is an issue of law. *Nichimen Am., Inc. v. United States*, 938 F.2d 1286, 1288 (Fed. Cir. 1991). We review decisions of the Court of International Trade dismissing for lack of subject matter jurisdiction *de novo*. *Friedman v. Daley*, 156 F.3d 1358, 1360 (Fed. Cir. 1998); *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995). This case calls upon us to distinguish between those issues which arise in the administration of antidumping duty orders which require a scope inquiry by Commerce, and those which are protestable to Customs.

The Tariff Act of 1930 instructs Commerce to determine whether foreign merchandise is being sold or is likely to be sold in the United States at less than its fair value. 19 U.S.C. § 1673 (1994). Concurrently, the International Trade Commission conducts an injury inquiry. If the International Trade Commission concludes that domestic industries are being materially injured or threatened with material injury by the foreign merchandise, Commerce proceeds to determine the class or kind of merchandise at issue and the margin at which it is being "dumped" or sold at less than fair value. *Id.* Commerce issues an antidumping duty order specifically describing the subject merchandise and designating its applicable rate of duty. *Id.* § 1673e(a)(2), (3). If a question arises as to whether merchandise is encompassed by an order, an interested party

may request a scope inquiry by Commerce under 19 U.S.C. § 1516a(a)(2)(B)(vi), to determine if "a particular type of merchandise is within the class or kind of merchandise described in an existing \*\*\* antidumping \*\*\* duty order." The determination is appealable to the Court of International Trade under its exclusive jurisdiction set forth in 28 U.S.C. § 1581(c) for actions "commenced under section 516A of the Tariff Act of 1930."

Customs is charged with the ministerial function of fixing "the amount of duty to be paid" on subject merchandise. 19 U.S.C. § 1500(c) (1994). When merchandise may be subject to an antidumping duty order, Customs makes factual findings to ascertain what the merchandise is, and whether it is described in an order. See *Marcel Watch Co. v. United States*, 11 F.3d 1054, 1056 (Fed. Cir. 1993) (stating that Customs makes similar factual determinations to classify merchandise under tariff headings). If applicable, Customs then assesses the appropriate antidumping duty. 19 U.S.C. § 1673e(a)(1) (1994); 19 C.F.R. § 351.211(b)(1) (2001). Such findings of Customs as to "the classification and rate and amount of duties chargeable" are protestable to Customs under 19 U.S.C. § 1514(a)(2). Denial of protests are reviewable by the Court of International Trade. 28 U.S.C. § 1581(a) (1994) (Exclusive jurisdiction lies for actions "commenced to contest the denial of a protest \*\*\* under section 515 of the Tariff Act of 1930.")

In this case, the court, relying on our decision in *Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed. Cir. 1998) (consolidating appeals of *Sandvik Steel Co. v. United States*, 957 F. Supp. 276 (Ct. Int'l Trade 1997), and *Fujitsu Ten Corp. of Am. v. United States*, 957 F. Supp. 245 (Ct. Int'l Trade 1997)), stated that antidumping determinations generally may not be protested to Customs, and therefore this Customs error requires a scope inquiry by Commerce. In *Sandvik*, we affirmed the Court of International Trade's dismissal for lack of jurisdiction when importers Sandvik Steel Co. ("Sandvik") and Fujitsu Ten Corp. ("Fujitsu") failed to exhaust their administrative remedies. Sandvik imported composite steel tubes with an inner tube of carbon steel covered by stainless steel of which the inner portion constituted seventy-five percent of the weight of the tube. *Sandvik*, 957 F. Supp. at 277. The antidumping duty order covered "stainless steel hollow products \*\*\* including tubes \*\*\* containing over 11.5 percent chromium by weight." *Id.* Sandvik's complaint specifically alleged that the tubes were not encompassed by the order because its tubes contained less than five percent chromium by weight. *Id.* Fujitsu imported "front ends," electronic parts used with automobile radio tuners. *Sandvik*, 164 F.3d at 598. Fujitsu alleged that the front ends were not covered in an antidumping order on "[t]uners of the type used in consumer electronic products." *Id.* (quoting Treasury Dep't Order A-588-014).

We held that the importers should have sought scope rulings from Commerce under 19 U.S.C. § 1516a(a)(2)(B)(vi) because in both cases it was unclear whether the goods at issue were within the scope of anti-

dumping duty orders. *Sandvik*, 164 F.3d at 598-99. We reasoned that Commerce "should in the first instance decide whether an antidumping order covers particular products," because "the order's meaning and scope are issues particularly within the expertise of that agency." *Id.* at 600. Moreover, the statute excludes antidumping determinations, that is, the calculation of duties, and the scope of orders, from matters that can be protested to Customs. *Id.* at 602. And to protect Commerce's administrative authority, neither Customs nor the court should make such determinations. *Id.* at 600.

In this case, however, the scope of the order is not in question, and therefore the reasoning in *Sandvik* does not apply. Xerox asserts that the belts at issue are facially outside the scope of the antidumping duty order and that it did not request a section 1516a(a)(2)(B)(vi) scope determination by Commerce because such an inquiry was unnecessary. We agree. The belts at issue were not used for power transmission and were not constructed with the materials listed in the order, and are clearly outside the order.

Xerox persuasively argues that correcting such a ministerial, factual error of Customs is not the province of Commerce. Instead an importer may file a protest with Customs. In cases such as this, where the scope of the antidumping duty order is unambiguous and undisputed, and the goods clearly do not fall within the scope of the order, misapplication of the order by Customs is properly the subject of a protest under 19 U.S.C. § 1514(a)(2). The Court of International Trade may review the denial of such protests under 28 U.S.C. § 1581(a). And pursuant to 19 U.S.C. § 1515(a), "any duties \* \* \* found to have been assessed or collected in excess shall be remitted or refunded." This appeal from Customs' denial is reviewable by the court.

#### CONCLUSION

Accordingly, the judgment of the Court of International Trade is reversed and the case is remanded for proceedings in accordance with this opinion.

#### REVERSED AND REMANDED



HARTOG FOODS INTERNATIONAL, INC., PLAINTIFF-APPELLANT v.  
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01-1229

(Decided May 17, 2002)

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Appealed from: United States Court of International Trade  
Judge JANE A. RESTANI

Before CLEVENGER, RADER, and PROST, Circuit Judges.

RADER, Circuit Judge.

On summary judgment, the United States Court of International Trade affirmed the United States Customs Service's denial of interest on Hartog Foods International, Inc.'s drawbacks. Because 19 U.S.C. § 1505 (2000) does not expressly and unequivocally waive sovereign immunity for interest awards on drawbacks, this court affirms.

## I.

Hartog imported strawberry and cranberry juice products on April 19, 1990 and February 6, 1992, and paid the estimated regular duties for each entry. After importation, Hartog discovered that the juices may have originated in the European Community, thus requiring payment of an additional 100% *ad valorem* duty on each entry. On September 11, 1992, Hartog voluntarily disclosed the additional duty requirement to Customs and paid the duties. By this time, Customs had liquidated both entries. Moreover, Hartog had exported the April 19, 1990 entry. Hartog later exported most of the merchandise from the February 6, 1992 entry. Hartog filed for drawback. Drawback, in this case, refers to a 99% refund of import duties, payable due to export of the dutiable imports. 19 U.S.C. § 1313(a) (2000). Customs granted drawbacks on the estimated regular duties, but denied drawbacks on the *ad valorem* duties. Hartog filed protests in 1992 and 1993 seeking drawbacks on the *ad valorem* duties, which Customs granted in 1998 under new drawback regulations.\* Thus, over five years after Hartog's requests, Customs paid Hartog the appropriate drawbacks, but did not pay interest on the drawbacks.

Hartog timely filed a protest claiming that Customs owed interest on the drawbacks. Customs denied Hartog's protest for interest by allow-

\* The parties dispute whether Customs had the authority to grant drawbacks on voluntary tenders, such as Hartog's payment of *ad valorem* duties, before 1998. This court need not reach that issue because Customs' pre-1998 authority to grant drawbacks does not affect the sovereign immunity principles that govern this award of interest on drawbacks.

ing thirty days to lapse after its filing. 19 U.S.C. § 1515(b) (2000). Therefore, Hartog filed this suit in the Court of International Trade. The Court of International Trade affirmed Customs' denial of interest because the drawback moneys did not qualify as "excess moneys deposited" under 19 U.S.C. § 1505(b)-(c) (2000), and because the United States Code does not unequivocally waive sovereign immunity for an award of interest on drawback claims. Hartog appealed to this court. This court has jurisdiction under 28 U.S.C. § 1295(a)(5) (1994).

## II.

This court reviews a grant of summary judgment, including statutory interpretation, by the Court of International Trade without deference. *Int'l Light Metals v. United States*, 194 F.3d 1355, 1361 (Fed. Cir. 1999) (*Light Metals I*). Where Customs has officially and reasonably construed an ambiguous statute, this court affords such construction *Chevron* deference. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Customs' rulings or interpretations that do not qualify as official statutory constructions nevertheless receive a measure of deference proportional to their persuasiveness. *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In this case Customs has not officially interpreted the relevant statutory language. Therefore, this court need not extend any *Chevron* deference. *Texport Oil Co. v. United States*, 185 F.3d 1291, 1294 (Fed. Cir. 1999) (declining *Chevron* deference where Customs' silence suggests no official statutory construction). Further, because Customs denied this protest without an official ruling, this court extends no *Skidmore* deference. This court therefore considers the parties' arguments in this case without deference.

Without an express statutory waiver, the United States is immune from interest. *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986). This "no-interest rule" amplifies this court's obligation to construe waivers of sovereign immunity strictly in favor of the sovereign. This court cannot infer a waiver of sovereign immunity. *Id.* at 318; *Kalan, Inc. v. United States*, 944 F.2d 847, 849 (Fed. Cir. 1991). A party, therefore, receives an interest award only where the United States Code unequivocally authorizes such an award. *Lane v. Pena*, 518 U.S. 187, 192 (1996).

Thus, this court seeks statutory language that unambiguously authorizes an interest award. *International Bus. Mach. Corp. v. United States*, 201 F.3d 1367, 1372-1373 (Fed. Cir. 2000); *Kalan*, 944 F.2d 852. To meet its burden under sovereign immunity principles, Hartog offers the only statutory provision that may satisfy the strict requirement for a waiver, namely 19 U.S.C. § 1505(b). This provision recites:

(b) Collection or refund of duties, fees, and interest due upon liquidation or reliquidation

The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or *refund any excess moneys deposited, together with interest thereon*, as determined

on a liquidation or reliquidation. Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment. Refunds of excess moneys deposited, together with interest thereon, shall be paid within 30 days of liquidation or reliquidation.

19 U.S.C. § 1505(b) (emphasis added). Section 1505(b) unambiguously waives sovereign immunity only for interest awards on "excess moneys deposited." Section 1505(c), in turn, explains how to calculate interest on the "excess moneys deposited:"

(c) Interest

Interest assessed due to an underpayment of duties, fees, or interest shall accrue at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. *Interest on excess moneys deposited shall accrue*, at a rate determined by the Secretary, *from the date the importer of record deposits estimated duties, fees, and interest or*, in a case in which a claim is made under section 1520(d) of this title, from the date on which such claim is made, to the date of liquidation or reliquidation of the applicable entry or reconciliation.

19 U.S.C. § 1505(c) (emphasis added). Hence, drawbacks merit interest awards only if they qualify as "excess moneys deposited" under section 1505(b), and if so qualifying, interest on the drawbacks accrues, as specified by 1505(c), from the date of deposit.

Section 1505 provides no express definition of "excess moneys deposited." The *Oxford English Dictionary* defines "excess" as "beyond the usual or specified amount; beyond what is necessary, proper or right." *Oxford English Dictionary* (2d ed. 1989). This definition is consistent with 19 U.S.C. § 1520(a)(1) (2000), which authorizes refunds on "excess deposits" "[w]henver it is ascertained on liquidation or reliquidation of an entry or reconciliation that more money has been deposited or paid as duties than was required by law to be so deposited or paid." Indeed, both sections 1505 and 1520 are codified under part III (entitled "Ascertainment, Collection and Recovery of Duties"), subtitle III of the Tariff Act of 1930. 19 U.S.C. §§ 1481-1529 (2000).

This court's case law reflects a similar understanding of "excess moneys deposited." For example, in *Travenol Labs., Inc. v. United States*, 118 F.3d 749, 753 (Fed. Cir. 1997), this court stated that "section 1505(c) [ ] relates to interest—specifically, interest owed for either an underpayment or overpayment of estimated duties." Hence, the ordinary meaning of "excess," the definition of "excess deposits" in a related statutory provision, and this court's case law lead to the same conclusion—"excess moneys deposited" refers to an overpayment of estimated duties, i.e., the deposit or payment of money beyond legal requirements.

Customs determines overpayments at liquidation or reliquidation. 19 U.S.C. § 1505(b); *Travenol*, 118 F.3d at 753 (Liquidation or reliquidation "determines whether there has been an overpayment or underpayment, and thus defines the basis upon which interest might be due."). Al-

though an overpayment does not emerge until the final reckoning at liquidation or reliquidation, the payment resulting in an excess occurred at the time of deposit. Thus, the importer makes a payment that is not identified as excess until liquidation or reliquidation. In a typical case, the importer pays estimated duties under a Harmonized Tariff Schedule of the United States (HTSUS) provision only to find—upon correct classification under a different HTSUS provision—the initial deposit was excessive. In such a case, Customs refunds the difference between the initial deposit and the required amount (i.e., the excess) with interest. Indeed, section 1505 sets the interest to accrue from the date of deposit. Thus, the statute implicitly considers the moneys excessive at the time of deposit even though the final reckoning occurs only later at liquidation or reliquidation. Thus, section 1505(c) requires the Customs to pay interest for the entire period during which it possessed the overpayment.

Standard drawback claims, however, present a different scenario. Drawbacks are a privilege, not a right. *United States v. Allen*, 163 U.S. 499, 504 (1896); see also *Swan & Finch Co. v. United States*, 190 U.S. 143, 146–47 (1903) (Because the drawback statute is a grant of privilege, the construction most advantageous to the interests of the government must be adopted.). Drawback refunds do not compensate for duty overpayments, but instead help enforce the United States' policy of "encourag[ing] domestic manufacture of articles for export and \* \* \* allow[ing] those articles to compete fairly in the world marketplace." *Light Metals I*, 194 F.3d at 1364–66; see also *Tide-Water Oil Co. v. United States*, 171 U.S. 210, 216 (1898). The drawback refunds encourage an importer to export and thus prevent certain goods from reaching the United States market. To receive a refund, however, the exporter must comply with all statutory and regulatory requirements of the drawback statutes. For drawback refunds, Customs does not determine that the importer overpaid estimated duties or in any way paid an amount beyond legal requirements. Rather, Customs refunds a portion of the paid duties and fees as an incentive to export. 19 U.S.C. § 1313(a)–(b).

In the present case, Hartog asks for an interest award on standard drawback refunds. Hartog, however, is entitled to drawbacks not because it overpaid duties or fees, but because it complied with the statutory and regulatory requirements for drawbacks. Hartog did not pay any amount in excess of the legal duties owed, and does not claim any improper calculation of the duties. Rather, Hartog seeks only to "draw back" or get back a portion of properly and accurately paid duties. The statutory provision for drawback refunds, however, does not transform properly paid duties and fees into excessive moneys subject to interest awards.

With drawback situations, Customs has not possessed or benefited from possession of erroneous or excessive collections—the underlying rationale for interest on excess payments. Moreover Customs has not held money to which it had no legal entitlement upon final reckoning. At

all times, Customs had full entitlement to the funds the importer now seeks to draw back. As the Court of International Trade correctly noted, the import duties are not erroneously or excessively paid just because drawback may be claimed at a later date. Hartog paid the legally required amount, and then complied with the drawback provisions to get some of that payment back. Nonetheless Hartog's payments are not "excess moneys deposited" within the meaning of section 1505.

Hartog, however, argues that even if the moneys were not "excess moneys deposited" before export of the juice products, they "became" excessive upon export of the products. At that time, Hartog contends, Customs was no longer entitled to the duties and "undergranted" or delayed in granting the drawbacks. This contention runs afoul of section 1505(c). As noted earlier, section 1505(c) dictates that interest on excess moneys accrues from the date of deposit. Under Hartog's contention, the interest would thus begin to accrue at a time before the alleged "excess" moneys became "excessive."

In fact, Hartog expresses no view on how to calculate the interest on drawbacks. Perhaps Hartog expects Customs to calculate interest on only the 99% of the deposited duties available for drawback under the drawback statutes. The imprecision and guesswork involved in applying section 1505 to drawbacks, however, underscores that section 1505 simply was not drafted with drawbacks in mind.

Hartog invokes *Travenol* to support its contention. *Travenol* held that liquidation or reliquidation "determines whether there has been an overpayment \* \* \* and [ ] defines the basis upon which interest might be due." *Travenol*, 118 F.3d at 753. This court agrees that liquidation or reliquidation functions as the final reckoning or triggering event to determine whether deposited moneys are excessive, but disagrees that *Travenol* supports any claim to interest on drawbacks. *Travenol* involved a claim to interest on refunds granted as a result of improper classification of the imported articles under the HTSUS. *Id.* at 751. *Travenol* did not involve a drawback claim.

Although the parties cite no precedent from this court holding that standard drawbacks deserve interest under section 1505, this court has addressed interest claims in cases where Customs granted drawbacks and then erroneously required repayment of the granted drawbacks. See *Novacor Chemicals, Inc. v. United States*, 171 F.3d 1376 (Fed. Cir. 1999); *Int'l Light Metals v. United States*, 279 F.3d 999 (Fed. Cir. 2002) (*Light Metals II*). In *Novacor*, this court held that Novacor was not entitled to interest on a drawback granted and then erroneously reclaimed and held by Customs for almost five years. *Novacor*, 171 F.3d at 1382. In so holding, this court determined that 19 U.S.C. § 1520(d) (1988) did not unambiguously provide interest on drawbacks. *Id.* Further, despite Hartog's assertions to the contrary, *Novacor* did not hold that the Customs Modernization Act of 1993 (Modernization Act), which amended 19 U.S.C. § 1505 (1988), authorized interest on drawbacks. The 1988 version of section 1505(b) required Customs to "refund any excess of du-

ties deposited as determined on a liquidation or reliquidation." The amended version requires Customs to "refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation." 19 U.S.C. § 1505(b). In providing for interest on the excessive moneys in the 1993 amendments, title 19 could have, but did not, expressly and unequivocally authorize interest awards on drawbacks.

In *Light Metals II*, Customs initially granted the exporter a drawback. *Light Metals II*, 279 F.3d at 1001. Customs later claimed that the drawback grant was improper and demanded the exporter repay the drawback with interest. *Id.* at 1001-02. After determining that Customs reclaimed the drawback in error, this court affirmed the Court of International Trade's judgment refunding the reclaimed amount plus interest. In so doing, this court sought to place the exporter back into the position it occupied before Customs' error. *Id.* at 1004. This court stated: "The proper way to accomplish that result was to require Customs to repay [the exporter] the drawback [Customs] had allowed in the first instance, together with interest." *Id.* at 1003. *Light Metals II* does not deal with an interest award on standard drawback claims; nor does *Light Metals II* even cite section 1505. In fact, *Light Metals II* does not at any point address sovereign immunity principles that govern award of interest. Moreover, neither party in *Light Metals II* raised the sovereign immunity requirement.

In sum, no matter how unusual or compelling the facts of a case, sovereign immunity principles govern and permit interest only if the United States Code has expressly and unequivocally waived sovereign immunity and authorized such awards. Section 1505 consents to interest awards for "excess moneys deposited." This court must strictly construe the term "excess moneys deposited," and cannot broaden the meaning of such term through judicial interpretation. As noted above, the term "excess moneys deposited" does not expressly and unequivocally include the drawbacks at issue in this case. Sovereign immunity and the "no interest" rule compel great specificity. Section 1505 simply lacks the requisite specificity.

Hartog also argues that this court may award interest on the facts of this case without reaching the broader question of whether section 1505 provides a general entitlement to interest on all drawbacks. Despite the unusual fact that Hartog paid the *ad valorem* duty after export of the first entry, Hartog's request nevertheless asks for interest on a regular drawback claim. Thus, despite Hartog's assertions to the contrary, this court may not grant the requested relief unless drawbacks fall within the express statutory language of section 1505.

#### CONCLUSION

Because the Court of International Trade correctly held that Hartog's drawbacks are not "excess moneys deposited" under section 1505(b)



and that the United States is immune from an interest award in this case, this court affirms.

#### COSTS

Each party shall bear its own costs.

#### AFFIRMED

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FAG ITALIA S.P.A. AND FAG BEARINGS CORP., PLAINTIFFS-APPELLANTS, AND  
SKF USA INC. AND SKF INDUSTRIE S.P.A., PLAINTIFFS-APPELLANTS *v.*  
UNITED STATES, DEFENDANT-CROSS APPELLANT, AND THE TORRINGTON  
CO., DEFENDANT-CROSS APPELLANT

Appeal No. 01-1212, 01-1213, 01-1214, 01-1215

(Decided May 24, 2002)

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Appealed from: United States Court of International Trade  
Senior Judge NICHOLAS TSOUCALAS

Before MICHEL, DYK, and PROST, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge DYK*, in which *Circuit Judge PROST* joins. *Circuit Judge MICHEL* concurs-in-part and dissents-in-part.

*DYK, Circuit Judge.*

This case presents two issues. First, it involves the question whether the Department of Commerce ("Commerce") properly defined "foreign like product" for purposes of 19 U.S.C. §§ 1677b(a)(1) and 1677b(e). In *SKF USA Inc. v. United States*, 263 F.3d 1369 (Fed Cir. 2001), we vacated the Court of International Trade's decision on that identical issue and remanded for Commerce to explain why it uses a different definition of "foreign like product" for price-based calculations for normal value

than it does for calculations of constructed value. The parties agree that *SKF USA* governs here, and that we should likewise remand this case to Commerce for further consideration of that issue. Accordingly, we will not discuss the "foreign like product" issue further in this opinion. We vacate the decision of the Court of International Trade on this issue and remand for further proceedings consistent with our opinion in *SKF USA*.

Second, this case involves the question whether Commerce can properly conduct a duty absorption inquiry pursuant to 19 U.S.C. § 1675(a)(4) for "transition orders"<sup>1</sup> in 1996 and 1998, the second and fourth years after the deemed issuance date of transition orders under section 1675(c)(6)(D). We hold that Commerce's action in conducting such inquiries is not authorized by the statute and affirm the judgment of the Court of International Trade in this respect. The opinion that follows addresses that issue.<sup>2</sup>

#### STATUTORY BACKGROUND

The antidumping statute is designed to prevent foreign goods from being sold at unfairly low prices in the United States to the injury of United States producers. Antidumping orders are issued as a result of a process that involves both Commerce and the ITC.

Commerce decides whether dumping exists by determining whether foreign merchandise has been sold or is likely to be sold in the United States at "less than its fair value." 19 U.S.C. § 1673(1) (2000). Commerce first makes a preliminary determination whether there is a reasonable indication that foreign merchandise is being sold at less than fair value, 19 U.S.C. § 1673b(b)(1)(A) (2000), then establishes dumping margin<sup>3</sup> rates reflecting that amount. 19 U.S.C. §§ 1673d(a)(1), 1673d(c)(1)(B) (2000). The ITC determines whether a domestic industry is "materially injured" or is "threatened with material injury," or whether "the establishment of an industry in the United States is materially retarded" by dumping. 19 U.S.C. § 1673d(b)(1) (2000). If the determinations of Commerce and ITC are both affirmative, Commerce issues an antidumping order assessing duties on the foreign exporter. 19 U.S.C. § 1673d(c)(2) (2000).

Before the amendments to the antidumping statute under the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994), the only statutorily authorized review of antidumping orders after they were issued was Commerce's annual administrative review, in which Commerce reviewed the amount of antidumping duty, and recalculated the dumping margin as necessary to reflect actual competitive conditions. 19 U.S.C. § 1675(a)(1) (1988). These annual reviews

<sup>1</sup> "Transition orders" are orders predating January 1, 1995, "the date the WTO Agreement enter[ed] into force with respect to the United States." 19 U.S.C. § 1675(c)(6)(C) (2000).

<sup>2</sup> Contrary to FAG's argument, this case is not moot. The International Trade Commission's ("ITC's") sunset review proceeding is not yet final, and a remand here would require the ITC to consider Commerce's duty absorption determinations.

<sup>3</sup> The "dumping margin" is the total amount by which the price charged for the subject merchandise in the home market exceeds the price charged in the United States. 19 U.S.C. § 1677(35)(A) (2000).

were continued in the URAA amendments. See 19 U.S.C. § 1675(a)(1) (2000). Under the URAA amendments, Congress additionally: (1) authorized Commerce to conduct so-called duty absorption inquiries in conjunction with its second and fourth annual administrative reviews of antidumping orders, upon request by an interested domestic party; and (2) provided for a completely new kind of review of antidumping duty orders: sunset reviews, to be jointly conducted by ITC and Commerce five years after the issuance of an order. Sunset reviews eliminate needless antidumping orders by terminating orders after five years, unless ITC and Commerce both determine that revocation of the orders would lead to recurrence of dumping and material injury. Subsection (a) of section 1675 governs duty absorption inquiries. Subsection (c) governs sunset reviews.

#### DUTY ABSORPTION

The purpose of a duty absorption inquiry is to ensure that foreign exporters identified by Commerce as dumping goods in the United States do not undermine the purpose of the antidumping laws by "absorbing" the duty rather than passing the duty on to United States purchasers in the form of higher prices. In such circumstances, dumping continues despite the assessment of the duty, and, as a result, "the remedial effect of an antidumping order may be undermined \* \* \*." *Joint Report of the Committee on Finance, Committee on Agriculture, Nutrition, and Forestry, Committee on Governmental Affairs of the United States Senate to accompany S. 2467, S. Rep. No. 103-412, at 44 (1994).*

Congress provided that:

During any [annual] review \* \* \* initiated 2 years or 4 years after the publication of an antidumping duty order, [Commerce], if requested, shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter.

19 U.S.C. § 1675(a)(4) (2000).<sup>4</sup> Section 1675(a)(4) further provides that Commerce "shall notify the [ITC] of its findings regarding such duty absorption for the [ITC] to consider in conducting a [sunset review]."

The consequence of a finding of duty absorption by Commerce is that the anti-dumping order is less likely to be revoked as a result of a sunset review. The Statement of Administrative Action recognized that "[d]uty absorption may indicate that the [foreign] producer or exporter would be able to market more aggressively should the order be revoked as a result of a sunset review." *Uruguay Round Agreements Act: Statement of*

<sup>4</sup> The duty absorption inquiry only applies to affiliated importers. 19 U.S.C. § 1675(a)(4) (2000). The regulations deal separately with the problem of unaffiliated importers who are reimbursed by foreign exporters, providing that Commerce, when calculating the export price, will "deduct the amount of any antidumping duty or countervailing duty which the exporter or producer: (A) Paid directly on behalf of the importer; or (B) Reimbursed to the importer." 19 C.F.R. § 351.402(f) (2001). This has the effect of increasing the duty amount.

*Administrative Action* ("SAA"), H.R. Doc. No. 103-316, at 886 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4211. It was further understood:

Duty absorption is a strong indicator that the current dumping margins calculated by Commerce in reviews may not be indicative of the margins that would exist in the absence of an order. Once an order is revoked, the importer could achieve the same pre-revocation return on its sales by lowering its prices in the U.S. in the amount of the duty that previously was being absorbed. \* \* \*

*An affirmative finding of absorption in an administrative review initiated two years after the issuance of an order is intended to have a deterrent effect on continued absorption of duties by affiliated importers; if they engage in duty absorption, they will know that they will face an additional hurdle that will make it more difficult to obtain revocation or termination. If, in the four-year review, Commerce finds that absorption has taken place, it will take that into account in its determination regarding the dumping margins likely to prevail if an order were revoked.*

*Id.* at 885-86, reprinted in 1994 U.S.C.C.A.N. at 4210 (emphases added).

#### SUNSET REVIEWS

The purpose of the sunset review is to eliminate needless orders by terminating antidumping orders after five years unless Commerce determines that revocation of the duty "would be likely to lead to continuation or recurrence of dumping," and ITC determines that revocation of the duty "would be likely to lead to \* \* \* material injury." 19 U.S.C. § 1675(c)(1) (2000). Unless both agencies make affirmative determinations, the order must be revoked. The sunset review is held "5 years after the date of publication of \* \* \* an antidumping duty order," and every five years thereafter. 19 U.S.C. § 1675(c)(1)(A) (2000); S. Rep. No. 103-412, at 45.

ITC considers several factors in deciding whether revocation would likely lead to material injury. 19 U.S.C. § 1675a(a)(1) (2000).<sup>5</sup> Among other things, the statute provides that in sunset reviews ITC "shall" consider Commerce's two and four-year duty absorption determinations. 19 U.S.C. § 1675a(a)(1)(D) (2000).

#### TRANSITION ORDERS

There is no issue in this case as to the operation of these duty absorption inquiry or sunset review provisions with respect to antidumping orders issued after January 1, 1995, the date the URAA amendments came into effect in the United States. The controversy concerns orders issued

<sup>5</sup>Section 1675a(a)(1) provides in part:

The [ITC] shall take into account—

(A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued or the suspension agreement was accepted,

(B) whether any improvement in the state of the industry is related to the order or the suspension agreement,

(C) whether the industry is vulnerable to material injury if the order is revoked or the suspension agreement is terminated, and

(D) in an antidumping proceeding under section 1675(c) of this title, the findings of [Commerce] regarding duty absorption under section 1675(a)(4) of this title.

19 U.S.C. § 1675a(a)(1) (2000).

before that date—so called “transition orders.” A “transition order” is defined in the statute as “an antidumping duty order \* \* \* which is in effect on the date the WTO Agreement enters into force with respect to the United States,” that is, January 1, 1995. 19 U.S.C. § 1675(c)(6)(C) (2000). Congress was well aware that “there likely will be more than 400 of these transition orders” issued before January 1, 1995, and Congress also recognized that “special rules are necessary to enable the agencies to conduct five-year reviews within a reasonable period and in a manner consistent with the [URAA] Agreements.” SAA at 882, *reprinted in* 1994 U.S.C.C.A.N. at 4208. Congress accordingly explicitly provided for sunset review of transition orders: “[f]or purposes of this subsection [(c)], a transition order shall be treated as issued on the date the WTO Agreement enters into force with respect to the United States.” 19 U.S.C. § 1675(c)(6)(D) (2000). Thus, transition orders were deemed issued on January 1, 1995, and subject to a sunset review five years after that date.

In the URAA amendments, Congress did not provide for duty absorption inquiries of transition orders in the second or fourth years after the deemed issuance date. Nonetheless, Commerce has claimed the authority to undertake such duty absorption inquiries for transition orders in the second and fourth years after the deemed issuance date, thus leading to the present proceeding.

#### PROCEEDINGS BELOW

In 1997, Commerce promulgated a regulation interpreting the statutory scheme as permitting it to conduct duty absorption inquiries of transition orders, if requested, in any annual review initiated in 1996 or 1998. 19 C.F.R. § 351.213(j) (1998).<sup>6</sup> However, this regulation is not binding here, because the review at issue was initiated in 1996, and the regulation applies only to “administrative reviews initiated on the basis of requests made on or after the first day of July, 1997. \* \* \*” *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,416–17 (May 19, 1997). Thus Commerce contradicts itself—on the one hand promulgating a regulation purporting to authorize reviews in 1996, and at the same time stating that that regulation is inapplicable to pre-July 1, 1997, reviews. The regulation nonetheless states Commerce’s views that second and fourth year reviews of transition orders *are* authorized by the statute.

This case predates the issuance of that regulation. At issue in this case is the seventh annual administrative review of an antidumping order on antifriction bearings (“AFBs”) imported to the United States during the

<sup>6</sup> 19 C.F.R. § 351.213(j)(2) provides:

(j) *Absorption of antidumping duties.*

(1) During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping order under § 351.211, or a determination under § 351.218(d) (sunset review), the Secretary, if requested \* \* \* will determine whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. \* \* \*

(2) For transition orders defined in section 751(c)(6) of the Act, the Secretary will apply paragraph (j)(1) of this section to any administrative review initiated in 1996 or 1998.

period of May 1, 1995, through April 30, 1996. Plaintiff-appellant FAG-Italia S.p.A. is a manufacturer of AFBs from Italy that are subject to the antidumping order, and plaintiff-appellant FAG Bearings Corporation imports those AFBs (collectively, "FAG"). Plaintiff-appellant SKF USA and plaintiff-appellant SKF Industrie S.p.A. (collectively, "SKF") also manufacture and import Italian AFBs that are subject to the antidumping order.

On May 15, 1989, Commerce issued the antidumping order.<sup>7</sup> On June 20, 1996, Commerce initiated the seventh annual administrative review of this order for the period of May 1, 1995, to April 30, 1996.<sup>8</sup> On June 10, 1997, Commerce published *Preliminary Results* of its review.<sup>9</sup> On October 17, 1997, Commerce published its *Final Results*.<sup>10</sup> In its *Final Results*, Commerce found that FAG and SKF engaged in duty absorption with respect to Italian AFBs. 62 Fed. Reg. at 54,044.

It is undisputed that the underlying order, originally issued May 15, 1989, is a "transition order" with a deemed issuance date of January 1, 1995, for sunset review purposes. 19 U.S.C. § 1675(c)(6)(D) (2000). From the outset of its investigation, Commerce regarded this seventh annual administrative review as the "second year" review for purposes of its duty absorption inquiry, *i.e.*, as a review taking place during the second year after the January 1, 1995, deemed issue date. On May 31, 1996, and July 9, 1996, the Torrington Co. ("Torrington") requested Commerce to determine, with respect to various respondents, whether antidumping duties had been absorbed during the period of review. *Final Results*, 62 Fed. Reg. at 54,075. Commerce proceeded to conduct the duty absorption inquiry, explaining the basis for the inquiry in its *Preliminary Results*:

The preamble to [Commerce's] proposed antidumping regulations explains that reviews initiated in 1996 will be considered initiated in the second year and reviews initiated in 1998 will be considered initiated in the fourth year. Although these proposed antidumping regulations are not yet binding upon [Commerce], they do constitute a public statement of how [Commerce] expects to proceed in construing [19 U.S.C. § 1675(a)(4)]. This approach ensures that interested parties will have the opportunity to request a duty-absorption determination prior to the time for sunset review of the order under [19 U.S.C. § 1675(c)] on entries for which the second and fourth years following an order have already passed.

<sup>7</sup> *Antidumping Duty Orders: Ball Bearings and Cylindrical Roller Bearings, and Parts Thereof From Italy*, 54 Fed. Reg. 20,903 (Dep't Commerce May 15, 1989).

<sup>8</sup> *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Duty Administrative Reviews and Notice of Request for Revocation of an Order*, 61 Fed. Reg. 31,506 (Dep't Commerce June 20, 1996) ("Notice of Initiation").

<sup>9</sup> *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 62 Fed. Reg. 31,566 (Dep't Commerce June 10, 1997) ("Preliminary Results").

<sup>10</sup> *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Administrative Reviews*, 62 Fed. Reg. 54,043 (Dep't Commerce Oct. 17, 1997) ("Final Results").



*Preliminary Results*, 62 Fed. Reg. at 31,568 (citation omitted). Commerce concluded:

Because these orders on AFBs have been in effect since 1989, these are transition orders in accordance with [19 U.S.C. § 1675(c)(6)(C)]; therefore, based on the policy stated above, [Commerce] will consider a request for an absorption determination during a review initiated in 1996. This being a review initiated in 1996 and a request having been made, we are making a duty-absorption determination as part of these administrative reviews.

*Id.*

In its *Final Results*, Commerce repeated its rationale for conducting the duty absorption inquiry. 62 Fed. Reg. at 54,074-75. It also found that SKF and FAG failed to put evidence into the record to support their position that they and their affiliated importers were not absorbing the duties, and concluded that duty absorption had occurred. 62 Fed. Reg. at 54,076. SKF and FAG challenged the *Final Results* as they pertain to AFBs from Italy in the United States Court of International Trade.

In *FAG Italia S.p.A. v. United States*, No. 97-11-01984, 2000 WL 978462 (Ct. Int'l Trade July 13, 2000), the Court of International Trade concluded that Commerce lacked statutory authority to conduct a duty absorption inquiry for the transition order in dispute. The court relied on its reasoning in *SKF USA Inc. v. United States*, 94 F. Supp. 2d 1351 (Ct. Int'l Trade 2000), after determining that the duty absorption inquiry and the parties' arguments in this case were "practically identical" to those in *SKF USA*. *FAG Italia* at \*5. In the earlier case, the court determined that Commerce lacked authority to conduct a duty absorption inquiry in the ninth administrative review of a transition order, finding that "the deemed January 1, 1995 issuance date of § 1675(c)(6)(D) is inapplicable to the order." *SKF USA*, 94 F. Supp. 2d at 1357. The court found that section 291 of the URAA provided an "unambiguous directive" from Congress that the section providing for duty absorption inquiries "must be applied prospectively on or after January 1, 1995 for 19 U.S.C. § 1675 reviews," and accordingly concluded that Commerce lacked authority to conduct the duty absorption inquiry of the transition order at issue. *Id.* at 1358-59 (internal citations omitted). Relying on *SKF USA*, the court in *FAG Italia* remanded to Commerce with instructions to "annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for this review." *FAG Italia* at \*8. Upon finding that Commerce complied with the terms of the remand, the court issued its final judgment in *FAG Italia S.p.A. v. United States*, No. 97-11-01984, 2000 WL 1846112 (Ct. Int'l Trade Dec. 15, 2000), dismissing the case.

Commerce and Torrington appealed the Court of International Trade's determination that Commerce lacked statutory authority to conduct the duty absorption inquiry. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

## STANDARD OF REVIEW

"When reviewing anti-dumping determinations made by Commerce, this court applies anew the standard of review applied by the Court of International Trade in its review of the administrative record." *SKF USA Inc. v. United States*, 263 F.3d 1369, 1378 (Fed. Cir. 2001) (quoting *ELLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1031 (Fed. Cir. 2000)).

We review questions of statutory interpretation without deference, *U.S. Steel Group v. United States*, 225 F.3d 1284, 1286 (Fed. Cir. 2000), except to the extent that deference to Commerce's interpretation may be required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

## DISCUSSION

Commerce does not claim that any provision of the statute explicitly authorizes it to conduct duty absorption inquiries as part of its annual review of transition orders in the second and fourth years after January 1, 1995. Nor does Commerce claim that there is any ambiguous language of the statute that might be interpreted to convey such authority.<sup>11</sup> Commerce's concession is well taken. The statute only provides for duty absorption inquiries "[d]uring any review under this subsection [subsection (a), governing annual administrative reviews] initiated 2 years or 4 years after the publication of an antidumping duty order \* \* \*." 19 U.S.C. § 1675(a)(4) (2000). The order in question was published in 1989; the two and four year annual reviews occurred in 1991 and 1993, well before the absorption provision of the URAA was even enacted. The deemed issuance date for transition orders does not change this result. In providing for a deemed issuance date for transition orders, the statute provides that "[f]or purposes of this subsection [subsection (c), governing sunset reviews], a transition order shall be treated as issued" on January 1, 1995. 19 U.S.C. § 1675(c)(6)(D) (2000). There is no provision creating a "treated as" date for transition orders for purposes of subsection (a), the subsection governing duty absorption inquiries. Finally, the statutory provisions governing annual reviews for Commerce do not confer general authority that might include the power

<sup>11</sup> At oral argument, the following exchange took place between the court and counsel for Commerce:

THE COURT: "What is the ambiguous language \* \* \* you're construing?"

COMMERCE: "The ambiguity, if there is one, is the absence of language. There is no specific reference in subsection (a) to the transition orders, but the entire section clearly addresses a program establishing a new program of duty absorption and five year inquiries, and recognizing that there were antidumping orders in existence prior to the establishment of this program, and that this program needs to apply to the transition orders. \* \* \*"

THE COURT: "There is no specific ambiguous language—"

COMMERCE: "There is no specific ambiguous language. There is an absence of language. There is a gap that needs to be filled if one wants to read it so restrictively as not applying to transition orders."

to consider duty absorption. 19 U.S.C. §§ 1675(a)(1)(B), 1675(b)(2) (2000).<sup>12</sup>

Commerce nonetheless urges that it has authority to conduct two and four year reviews of transition orders because both the statute and its legislative history are silent as to whether Commerce can conduct duty absorption inquiries in years other than years 2 and 4, and the statute does not explicitly prohibit or deny it such authority.<sup>13</sup>

Commerce seriously misunderstands its role under *Chevron*.<sup>14</sup> The first question we ask under *Chevron* is whether Congress has spoken to the precise question at issue. *Chevron*, 467 U.S. at 842. In the absence of clear direction from the statute, we then ask whether there is ambiguous statutory language that might authorize the agency to fill a statutory gap: "The power of an administrative agency to administer a congressionally created \* \* \* program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Then we ask whether Commerce's interpretation of ambiguous statutory language is based on a permissible interpretation of the statute. *Id.* at 843 & n.11. But here, Commerce can identify no ambiguities in the statute, nor any statutory "gaps" that Commerce is entitled to fill. Rather, Commerce argues:

Section 1675(a)(4) \* \* \* only addresses the question of when Commerce *must* conduct a duty absorption inquiry, *i.e.*, under certain enumerated conditions. Thus, left unanswered by section 1675(a)(4) is the proper issue that the case presented—whether the statutory scheme as a whole *precludes* Commerce from conducting a duty absorption inquiry for a transition order. The answer to this question must be in the negative because Congress has stated neither in 19 U.S.C. § 1675(a)(4) nor in any other statutory provision that Commerce is *precluded* from conducting such an inquiry.

Commerce Br. at 46. Given the statutory scheme as a whole and Congress's recognition that Commerce's duty absorption information is useful in ITC's sunset reviews, Commerce argues, Commerce's exercise of its discretion to conduct such reviews serves the purpose of the statute.

<sup>12</sup> Section 1675(a)(1)(B) provides that, "[a]t least once during each 12-month period beginning on the anniversary of the date of publication of \* \* \* an antidumping duty order," Commerce shall "review and determine \* \* \* the amount of any antidumping duty." 19 U.S.C. § 1675(a)(1)(B) (2000). Section 1675(a)(2) governs the "[d]etermination of antidumping duties," and provides:

For the purpose of paragraph (1)(B), [Commerce] shall determine—(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry.

19 U.S.C. § 1675(a)(2)(A) (2000).

<sup>13</sup> Torrington argues for an even broader interpretation, urging that Commerce has authority to conduct duty absorption inquiries every second and fourth year after each successive sunset review of all orders that survive the initial sunset review. Torrington Br. at 29. We reject this theory. Neither the statute nor its legislative history suggests that Commerce may conduct duty absorption inquiries beyond the initial sunset review, and the plain language of the statute provides that duty absorption inquiries be conducted "2 years or 4 years after the publication of an antidumping duty order." \* \* \* 19 U.S.C. § 1675(a)(4) (2000).

<sup>14</sup> Even though Commerce's regulations are inapplicable here, we have held that Commerce's administrative determinations are entitled to *Chevron* deference. *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1346-47 (Fed. Cir. 2001).

Thus, Commerce claims that it enjoys plenary power to engage in any activity related to its field of authority not specifically prohibited by Congress, so long as the administrative action will serve a congressional purpose. But no case of which we are aware holds that an administrative agency has authority to fill gaps in a statute that exist because of the absence of statutory authority. To the contrary, the Supreme Court has noted that "an agency literally has no power to act \* \* \* unless and until Congress confers power upon it," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), and has cautioned that "[t]o supply omissions [within a statute] transcends the judicial function." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (quoting *Iselin v. United States*, 270 U.S. 245, 250-51 (1926)).

It is indeed well established that the absence of a statutory prohibition cannot be the source of agency authority. In *Southern California Edison Co. v. Federal Energy Regulatory Commission*, 195 F.3d 17 (D.C. Cir. 1999), the District of Columbia Circuit reiterated that the absence of an express statutory provision cannot be interpreted as giving an agency authority:

[T]he court has repeatedly rejected the notion that the absence of an express proscription allows an agency to ignore a proscription implied by the limiting language of a statute, reasoning that such an approach requires "tortured statutory interpretation" and is based on the unlikely circumstance as to congressional intent giving agencies "virtually limitless hegemony, a result plainly out of keeping with *Chevron*."

*Id.* at 24 (citations omitted). At issue in *Southern California Edison* were provisions of the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 796(17)-(18), 824a-3, 824i, 824k (1994), governing statutory entitlements benefiting certain energy producers. The statute expressly defined a "small power production facility" as one that "produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof." 16 U.S.C. § 796(17)(A)(i) (1994). The Federal Energy Regulatory Commission ("FERC") allowed a producer that burned a substantial amount of natural gas to retain its status as a "small power production facility." FERC argued that the provision defining "primary energy source" refers "only to those uses that FERC may not consider in determining a facility's primary energy source, but has no bearing upon permissible uses of secondary energy sources." *Id.* at 23 (second and third emphases omitted). The court noted that to adopt FERC's rationale "is to assume a new category of nonconforming uses fueled by such a source that is nowhere mentioned in [the Act] or FERC's regulations and is unnecessary to give meaning to the provisions Congress enacted." *Id.* at 24. The court rejected FERC's interpretation because it "would have the effect of requiring Congress to state expressly" any denial of authority to the agency. *Id.*

Similarly, in *University of the District of Columbia Faculty Ass'n v. District of Columbia Financial Responsibility & Management Assistance Authority*, 163 F.3d 616, 621 (D.C. Cir. 1998), the District of Columbia Circuit noted that "[a]ppellants' premise—that the [agency] has the authority to do anything that is not expressly prohibited by [the governing statute]—is quite extraordinary and we reject it." At issue in that case was the District of Columbia Financial Responsibility and Management Assistance Act of 1995, which expressly gave the agency authority to review and approve new collective bargaining agreements ("CBAs"), but was silent as to whether the agency had authority to modify existing CBAs. *Id.* The agency argued that it was an "enormous stretch" to infer that, when Congress gave the agency authority to review and approve new CBAs, it simultaneously meant to prohibit the agency from modifying existing CBAs, and that it was improper for the district court to assume that, because Congress was silent as to existing CBAs, it meant to exclude such agreements from the agency's authority. *Id.* The court rejected this argument, relying on the "fundamental principle of statutory interpretation" articulated in *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (en banc), amended by, 38 F.3d 1224 (D.C. Cir. 1994), cert. denied, 514 U.S. 1032 (1995):

The [National Mediation Board] does not even claim that the terms of [the Act] support the authority it asserts. \* \* \* Instead, the Board would have us *presume* a delegation of power from Congress absent an express *withholding* of such power. This comes close to saying that the [National Mediation Board] has the power to do whatever it pleases merely by virtue of its existence, a suggestion that we view to be incredible.

*Univ. of Dist. of Columbia Faculty Ass'n*, 163 F.3d at 621 (quoting *Railway Labor*, 29 F.3d at 659).

In this case, the statutory silence as to Commerce's power to initiate duty absorption inquiries for transition orders does not give Commerce authority to conduct such inquiries. The fact that Commerce is empowered to take action in certain limited situations does not mean that Commerce enjoys such power in other instances. We cannot speculate that conducting two and four year reviews would serve Congress's purpose where Congress did not authorize such reviews for transition orders.<sup>15</sup> Nor is there any legislative history suggesting that Congress contemplated such two or four year reviews for transition orders.<sup>16</sup>

To be sure, if provisions of the statute were rendered meaningless if the authority Commerce seeks were denied to it, we would have a very

<sup>15</sup> Contrary to Torrington's argument that we should disregard the statutory language because it merely reflects a drafting error resulting from the pressures of fast-track legislation, this is not one of those rare situations in which statutory language can be ignored. See *Chickasaw Nation v. United States*, 122 S. Ct. 528, 535 (2001).

<sup>16</sup> Torrington argues that the duty absorption provisions were enacted to address specific concerns of American producers subject to sunset reviews arising from transition orders, and that Congress therefore must have intended for Commerce to conduct duty absorption inquiries of transition orders as well as new orders, citing testimony of domestic industry before the House Ways and Means Committee. Torr. Br. at 24-25. We doubt that such testimony, even if it existed, would carry much, if any, weight. In any event, the cited testimony relates to the industry's general concerns about duty absorption, and our attention has been drawn to no reference where that testimony focused on duty absorption inquiries specifically with respect to transition orders.

different case. In *SKF USA Inc. v. United States*, 263 F.3d 1369, 1379-80 (Fed. Cir. 2001), we resolved an apparent anomaly in the antidumping statute where the definition of a key statutory term appeared to apply solely to one part of the statute, in which the term did not even appear. Absent our interpretation applying that definition to the part of the statute in which the term actually appeared, the definition was meaningless.

But that is not the situation here. Our interpretation does not render any portion of the statute superfluous. Section 1675(c)(6)(D) fixes the issuance date for transition orders at January 1, 1995. Sections 1675(c)(6)(A)(i) and 1675(c)(6)(A)(ii) provide a schedule under which sunset reviews of transition orders are to be initiated and concluded: "[Commerce] shall begin its [sunset] review of transition orders in the 42d calendar month after the date such orders are issued," that is, January 1, 1995, and "reviews of all transition orders shall be completed not later than 18 months after the 5th anniversary of the date such orders are issued." The "date such orders are issued" refers to the date fixed in section 1675(c)(6)(D), *i.e.*, "the date the WTO Agreement enters into force with respect to the United States." Thus, the purpose of section 1675(c)(6)(D) is to subject transition orders to sunset reviews, by setting the date referred to in section 1675(c)(6)(A)(i).<sup>17</sup> Our interpretation gives meaning to all sections of the statute, including subsection (D).

While the sunset review provision states that the ITC "shall take into account," among other things, "the findings of [Commerce] regarding duty absorption under section 1675(a)(4)," 19 U.S.C. § 1675(a)(1) (2000), and such considerations cannot occur when no findings have been made by Commerce as to transition orders, we think that this minor anomaly is insufficient to confer authority on Commerce to conduct such reviews. Section 1675a(a)(1) must refer only to the situation in which duty absorption inquiries *in fact* exist. Even under Commerce's interpretation of the statute, duty absorption determinations may or may not exist for a particular sunset review (since such determinations, even under Commerce's view, are made only upon request). Commerce itself provides a rationale as to why Congress might have failed to provide authority for duty absorption inquiries as to transition orders: "Given this large number of transition orders that were subject to five-year reviews, it may well be that Congress simply did not wish to overburden Commerce by *requiring* it to conduct duty absorption inquiries for the transition orders." Commerce Br. at 52-53.

In effect, Commerce's interpretation requires the addition of statutory language that Congress did not include. Commerce would have us rewrite section 1675(c)(6)(D) to read "[f]or purposes of this subsection,

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<sup>17</sup> The Statement of Administrative Action stated: "New section [1675](c)(6)(A) establishes a schedule for completing five year reviews of transition orders in a timely and efficient manner." SAA at 882, reprinted in 1994 U.S.C.A.N. at 4208.



and subsection (a), a transition order shall be treated as issued on" January 1, 1995. This we cannot do.<sup>18</sup>

In holding that Commerce lacks authority to conduct two and four-year duty absorption inquiries for transition orders, we do not reach the question whether Commerce might have been authorized to conduct duty absorption inquiries as part of the sunset review itself under Commerce's general mandate to "conduct a review to determine \* \* \* whether revocation of the \* \* \* antidumping duty order \* \* \* would be likely to lead to continuation or recurrence of dumping." 19 U.S.C. § 1675(c)(1) (2000); see also 19 U.S.C. §§ 1675(d)(2), 1675a(c)(1) (2000). It might be argued that the general authority to conduct a sunset inquiry into the likelihood of continuation or recurrence of dumping (including with respect to transition orders) authorizes Commerce to consider absorption, even though section 1675(a)(4) deals explicitly with that subject. Recently in *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 122 S. Ct. 782, 789–90 (2002), the Supreme Court considered the FCC's authority to regulate pole attachment rates for wireless carriers. Sections 224(a)(1) and 224(d)(2) of the Pole Attachments Act specifically authorized the regulation of pole attachment rates but did not cover wireless carriers. The Court nonetheless interpreted sections 224(b) and 224(a)(4) of the Act, generally granting the FCC authority to "regulate the rates, terms, and conditions for pole attachments," *id.* at 789, as authorizing the FCC to regulate rates for "pole attachments" of wireless carriers, noting that "nothing in § 224(a)(1) or § 224(d)(2) limits § 224(a)(4) or § 224(b)." *Id.* at 790. Thus, despite the fact that the FCC lacked authority to regulate such carriers under certain specific sections of the statute, the Supreme Court found authority in more general provisions of the statute. But Commerce does not here argue that section 1675(c)(1) is a source of authority to conduct duty absorption inquiries for transition orders, and did not purport to exercise any such authority here. We decline to determine if such authority existed.

We affirm the Court of International Trade's determination that Commerce lacked authority to conduct a duty absorption inquiry with respect to this transition order, and we vacate and remand to the Court

<sup>18</sup> Our decision today is quite consistent with our prior decisions in *Ambassador Division of Florsheim Shoe v. United States*, 748 F.2d 1560 (Fed. Cir. 1984), and *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), and the District of Columbia Circuit's decision in *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 823 (1996). In those cases the agency had general authority to act, and the sole question was whether statutory limitations denied authority. See *Ambassador*, 748 F.2d at 1561–62 (finding that section governing review of countervailing duty orders broadly authorized Commerce to suspend liquidation of those orders); *Smith-Corona*, 713 F.2d at 1575–76 (finding that "the statute does vest broad discretion in the Secretary" to determine price adjustments, and that "[t]he statute does not expressly limit the exercise of the Secretary's authority"); *Mobile Communications*, 77 F.3d at 1404–07 (finding that broad authority in statute's "necessary and proper clause" authorized FCC to require licensee to pay discounted price). The existence of limitations on specific authority have been held not to deny authority under more general provisions. See *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 122 S. Ct. 782, 789–90 (2002), discussed below. Here, the agency lacks general authority to act. Commerce also relies on *Daewoo Electronics Co. v. International Union of Electronic, Electrical, Technical, Salaried & Machine Workers*, 6 F.3d 1511, 1520–23 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994). *Daewoo* was a case in which the agency limited its authority beyond what the statute might be read to require—not a situation in which the agency expanded its authority beyond the statute.

of International Trade for a determination of the "foreign like product" issue, consistent with our opinion in *SKF USA*.

#### COSTS

No costs.

#### AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED

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MICHEL, *Circuit Judge*, concurring-in-part and dissenting-in-part.

I believe the correct construction of the antidumping laws, reading as a whole the Uruguay Round Agreements Act ("URAA") amendments, is one in which duty absorption inquiries performed under § 1675(a)(4) apply to the five-year sunset reviews of transition orders. Because I cannot agree that logic permits an opposite conclusion, I respectfully dissent from that portion of the majority opinion that holds Commerce lacked the power to conduct the duty absorption inquiries as requested in this case.

According to § 291 of the URAA, the amendments made to the antidumping law "shall take effect on [January 1, 1995] and apply with respect to—\* \* \* (2) reviews initiated under [§ 1675] (A) by the administering authority or the Commission on their own initiative *after such date*, or (B) pursuant to a request filed *after such date*." See 19 U.S.C. § 1671 note (quoting URAA § 291 (emphasis added)).<sup>1</sup> The five-year sunset review at issue in this case was initiated after January 1, 1995, so the amendments to the antidumping law apply in this case, even though the order was published pre-URAA. The purpose of five-year sunset reviews is to determine whether revocation of the particular antidumping duty order at issue "would be likely to lead to continuation or recurrence" of material injury to domestic firms. 19 U.S.C. § 1675(c). Section 1675a(a), governing the procedure to be followed for making such a determination, states on its face that "[t]he Commission *shall* take into account \* \* \* (D) in an antidumping proceeding under section 1675(c) of this title, the findings of the administering authority regarding *duty absorption* under section 1675(a)(4) of this title." 19 U.S.C. § 1675a(a)(1) (emphasis added). Indisputably, transition orders are antidumping proceedings under § 1675(c). See 19 U.S.C. § 1675(c)(6).

When interpreting statutes, our task is to construe what Congress has enacted beginning with the language of the statute itself, giving effect—if at all possible—to every clause and word of the statute. *Duncan v. Walker*, 533 U.S. 167, 172, 174 (2001). We read statutes not in isolation but as a whole, *United States v. Morton*, 467 U.S. 822, 828 (1984), settling on a construction that reduces terms to surplusage *only* where we

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<sup>1</sup> The majority notes that the *SKF USA* court found that URAA § 291 "provided an 'unambiguous directive from Congress' that the section must be applied prospectively." *Ante* at 11. That is true—as to reviews. Section 291 plainly states that the effective date covers all reviews under § 1675 after January 1, 1995.

can find no other reasonable reading of the statute. See *Chickasaw Nation v. United States*, 534 U.S. 84, \_\_\_, 122 S. Ct. 528, 532 (2001). Furthermore, where our construction involves multiple statutory sections that were enacted simultaneously as part of the same Act, "the duty to harmonize them is particularly acute." *U.S. West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1053 (9th Cir. 2000) (citing *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972)); accord *Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir. 1984) (explaining that when different statutory sections are enacted *in pari materia*, "a legislative intent to have them work harmoniously together, and for neither to frustrate the other, or partially repeal it, is very much to be inferred"). With fidelity to these maxims, the majority concedes "we would have a very different case" if its interpretation of the statute rendered any relevant provision meaningless. I believe that this is indeed that very different case.

As part of the amendments under the URAA, Congress provided that Commerce "if requested, shall determine" whether duty absorption has occurred. 19 U.S.C. § 1675(a)(4). The purpose of Commerce's inquiry was manifest: an affirmative finding of duty absorption in years two or four places importers on notice that, should the practice continue, they would face increased difficulty in obtaining a revocation or termination of existing orders at their five-year sunset review. See Uruguay Round Agreements Act Statement of Administrative Action at 885-88, reprinted in 1994 U.S.C.C.A.N. 4040, 4210-11. To that end, the amendments affirmatively require Commerce to report those findings to the Commission: "The administering authority [Commerce] shall notify the Commission of its findings regarding such duty absorption for the Commission to consider in conducting a review under subsection (c) of this section." 19 U.S.C. § 1675(a)(4) (emphasis added). Again, that transition orders are subject to five-year sunset reviews under subsection (c) is not disputed, either by the parties or the majority.

Nevertheless, the majority opines that it "cannot speculate" how such reviews "would serve Congress's purpose where Congress did not authorize such reviews [*i.e.*, duty absorption inquiries] for transition orders." This begs the question—whether Congress authorized duty absorption inquiries for transition orders—and at the same time pays only lip-service to our maxims of statutory construction. We are duty-bound to construe sections 1675(a)(4), 1675(c), and 1675a(a)(1) harmoniously, if at all possible. These sections are easily reconcilable once one recognizes that each sunset review of a duty order must consider duty absorption inquiries if such inquiries have been performed, that transition orders are subject to sunset reviews, and therefore, sunset reviews of transition orders necessarily must consider duty absorption inquiries provided that such inquiries have been performed. One need not look beyond the face of the statute to reach this conclusion, a necessary consequence of which is that, regardless of whether in a specific case an inquiry was *actually* performed, the *possibility* for the Commission to

review such an inquiry must always exist. However, no such possibility exists under the court's reasoning.

The majority, deeming itself duty-bound not to "rewrite" the statute to include language that is already reasonably inferable from reading the statute as a whole, instead opts to read out (or, at a minimum, render meaningless) language expressly contained in the statute: the express, affirmative command to the Commission under § 1675a(a)(1) that it consider, during sunset reviews of transition orders, any findings that have been made under § 1675(a)(4). Recognizing this "minor anomaly," the majority attempts to justify it by speculating that § 1675a(a)(1) "must refer only to the situation in which duty absorption inquiries *in fact* exist." Such conjecture buckles under its own weight, however, as today's holding precludes the very existence of such a situation.<sup>2</sup>

Because duty absorption inquiries form a part of the core analysis in determining whether revocation of the antidumping duty order would be likely to lead to continuation or recurrence of material injury to domestics, the antidumping statute provides that they shall be considered by the Commission during sunset reviews of antidumping proceedings under § 1675(c). Transition orders are antidumping proceedings under § 1675(c). And because reviews at issue in this case were initiated after January 1, 1995, the URAA amendments to the antidumping statute govern this case. Therefore, in light of the entire statutory scheme, I believe that Congress intended such inquiries to apply to transition orders. To the extent the majority concludes otherwise, I respectfully dissent.

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<sup>2</sup> Duty absorption inquiries did not exist before the URAA amendments, and today's holding (1) rejects Commerce's argument that it has plenary power to conduct the reviews; (2) precludes duty absorption inquiries in years 1996 and 1998; and (3) precludes duty absorption inquiries in the second and fourth years leading up to any subsequent sunset review, see *ante* at 14 n.13. Thus, no inquiry for a transition order would ever exist *in fact*. Although the court leaves open the question whether Commerce might initiate its own inquiry during the sunset review, such a scenario is decidedly at odds with: (1) § 1675(a)(4)'s requirement that Commerce perform an inquiry "if requested"; (2) the requirement that the Commission review "findings . . . under § 1675(a)(4)"; and (3) the court's holding that Commerce lacks plenary authority to initiate *sua sponte* such a request in years two and four.

# United States Court of International Trade

One Federal Plaza  
New York, N.Y. 10278

## *Chief Judge*

Gregory W. Carman

## *Judges*

Jane A. Restani  
Thomas J. Aquilino, Jr.  
Donald C. Pogue  
Evan J. Wallach

Judith M. Barzilay  
Delissa A. Ridgway  
Richard K. Eaton

## *Senior Judges*

Nicholas Tsoucalas  
R. Kenton Musgrave  
Richard W. Goldberg

## *Clerk*

Leo M. Gordon





# Decisions of the United States Court of International Trade

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(Slip Op. 02-47)

SAN FRANCISCO CANDLE CO., INC., PLAINTIFF *v.* UNITED STATES,  
DEFENDANT, AND NATIONAL CANDLE ASSOCIATION, DEFENDANT-INTERVENOR

Court No. 01-00088

[Plaintiff's motion for judgment on the agency record denied. Remanded to the Department of Commerce for further proceedings consistent with this opinion.]

(Decided May 30, 2002)

*Sandler, Travis, & Rosenberg, P.A. (Philip S. Gallas, Gregory S. Menegaz) for Plaintiff.  
Robert D. McCallum, Jr., Assistant Attorney General, David M. Cohen, Director,  
Reginald T. Blades, Jr., Senior Trial Counsel, Commercial Litigation Branch, Civil Division,  
U.S. Department of Justice, John F. Koeppen, Of Counsel, Office of the Chief Counsel  
for Import Administration, U.S. Department of Commerce, for Defendant.*

*Barnes & Thornburg (Randolph J. Stayin, Karen A. McGee) for Defendant-Intervenor.*

## OPINION

POGUE, *Judge*: Plaintiff San Francisco Candle Company ("SFCC") moves for judgment upon the agency record pursuant to USCIT Rule 56.2, challenging a determination by the U.S. Department of Commerce ("Commerce") that certain candles are within the scope of an antidumping duty order. This Court has jurisdiction under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(vi) (2000).

## BACKGROUND

In August 1986, Commerce issued an antidumping duty order covering "[c]ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks \* \* \* sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers." *Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China*, 51 Fed. Reg. 30,686, 30,686 (Dep't Commerce 1986) ("Candles Order" or "Order"). A subsequent notice indicated that certain novelty candles would be excluded from the Order's scope:

The Department of Commerce has determined that certain novelty candles, such as Christmas novelty candles, are not within the

scope of the antidumping order on petroleum wax candles from the People's Republic of China (PRC). Christmas novelty candles are specially designed for use only in connection with the Christmas holiday season. This use is clearly indicated by Christmas scenes or symbols depicted in the candle design. Other novelty candles not within the scope of the order include candles having scenes or symbols of other occasions (e.g., religious holidays or special events) depicted in their designs, figurine candles, and candles shaped in the form of identifiable objects (e.g., animals or numerals).

Dep't of Commerce, Scope Clarification Notice, *Petroleum-Wax Candles from the People's Republic of China—Case Number A-570-504*, Pl.'s Ex. 4 at 1 ("Scope Clarification"); Customs Info. Exch. Notification, *Petroleum Wax Candles from the People's Republic of China—Antidumping—A-570-504*, CIE N-212/85 (Sept. 21, 1987).

In November 2000, SFCC requested that Commerce issue a scope ruling as to twelve candles.<sup>1</sup> See Letter from San Francisco Candle Company to Sean Carey, Dep't of Commerce, Int'l Trade Admin., Antidumping and Countervailing Enforcement Group III (Nov. 17, 2000), Compl. App. I ("Scope Ruling Request"). Commerce found eleven of the twelve candles to be within the scope of the Candles Order.<sup>2</sup> See *Final Scope Ruling; Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China*, (A-570-504); SFCC at 4-7 (Feb. 12, 2001) ("Final Scope Ruling"), Compl. App. III.

SFCC appeals the results of the Final Scope Ruling pursuant to 28 U.S.C. § 1581(c), claiming that all of the candles submitted in the Scope Ruling Request are novelty candles that fall outside the scope of the Candles Order. SFCC also submits for review the Christmas Patchwork Square, which Commerce did not address in its Final Scope Ruling,<sup>3</sup> and two candles that were not presented to Commerce in the Scope Ruling Request.<sup>4</sup> See Pl.'s Mem. Supp. Mot. J. Agency R. at 32 ("Pl.'s Mem."); Scope Ruling Request, Compl. App. I. Defendant asserts that candles 2, 3, 5, 6, 8, and 10 were correctly found to be within the scope of the

<sup>1</sup> SFCC submitted the following twelve candles for review in its Scope Ruling Request:

1. Christmas Holly Leaf with Berries Candy Cane Pillar (Item No. 03433)
2. Santa Claus Motif Candy Cane Pillar (Item No. 13403)
3. Christmas Tree with Star Candy Cane Pillar (Item No. 73633)
4. Christmas Holly Leaf Pillar (Item No. 83136)
5. Christmas Sock Pillar (Item No. 83036)
6. Santa Claus Pillar (Item No. 82936)
7. Carved Christmas Tree with Star Pillar (Item No. 64904)
8. Santa Claus Candy Cane Column (Item No. 00016)
9. Christmas Holly Leaf with Berries Candy Cane Column (Item No. 00016)
10. Christmas Tree with Star Candy Cane Column (Item No. 00016)
11. Christmas Holly Leaf with Berries Pillar (Item No. 166406)
12. Christmas Patchwork Pillar and Christmas Patchwork Square (Item No. 15736)

The opinion will refer to the candles by the assigned numbers 1-12.

<sup>2</sup> Commerce found Candle 7, the Carved Christmas Tree with Star Pillar (Item No. 64904), to be outside the scope of the Order. This is a white candle decorated with gold images of Christmas trees. Commerce held that the image is clearly identifiable as a Christmas tree, which is specific to the Christmas holiday; that the design is viewable from most angles; and that its removal would cause significant damage to the candle. This candle is not at issue here.

<sup>3</sup> The twelfth candle listed in the Scope Ruling Request is a Christmas Patchwork design available as a 3 in. x 6 in. pillar and a 3 in. x 3 in. cube. In its Final Scope Ruling, Commerce addressed the Christmas Patchwork Pillar but made no determination as to the Christmas Patchwork Square. See Scope Ruling Request, Compl. App. I ¶ 12; Final Scope Ruling at 7, Compl. App. III.

<sup>4</sup> These are the Moonlit Candy Cane candles (Item No. 213649), available in two color combinations: red, white, and green, or red and white.

Candles Order, and requests that candles 1, 4, 9, 11, and 12 be remanded for reconsideration by Commerce. *See* Def.'s Resp. Pl.'s Mot. J. Agency R. at 2-3 ("Def.'s Resp.").

#### STANDARD OF REVIEW

This Court will uphold an agency determination unless it is "unsupported by substantial evidence on the record or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(I) (2000). Substantial evidence is "something less than the weight of the evidence," *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966), but is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The possibility of drawing two inconsistent conclusions from the same evidence does not mean that the agency's finding is unsupported by substantial evidence, *see Consolo*, 383 U.S. at 620, and this court "may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *Timken Co. v. United States*, slip op. 02-38 at 5-6 (CIT Apr. 22, 2002) (internal citations omitted).

#### DISCUSSION

##### I. Scope Determinations

Commerce has inherent authority to define and clarify the scope of an antidumping duty investigation. *See Koyo Seiko Co., Ltd. v. United States*, 17 CIT 1076, 1078, 834 F. Supp. 1401, 1403 (1993), *aff'd*, 31 F.3d 1177 (Fed. Cir. 1994). However, "while [Commerce] may interpret those orders, it may not change them." *Ericsson GE Mobile Communication, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (citing *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)).

In determining whether a product falls within the scope of an order, Commerce looks to "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1) (2000). If the descriptions are dispositive, Commerce must issue the scope ruling based on this information alone. *See id.* at § 351.225(k)(2); *Nitta Indus. Corp. v. United States*, 997 F.2d 1459, 1461 (Fed. Cir. 1993).<sup>5</sup>

##### II. The Candles Order

In making a scope determination under the Candles Order, Commerce first determines whether the candle is in a shape covered by the Order. If so, Commerce then considers whether the candle may be ex-

<sup>5</sup> If a determination cannot be made using only the descriptions, Commerce initiates a scope inquiry and considers the following five factors: "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2); *see also Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983). In the instant case, the criteria of 19 C.F.R. § 351.225(k)(1) are dispositive. As Commerce concluded, no consideration of the criteria 19 C.F.R. § 351.225(k)(2) was required.

cluded from the Order as a novelty candle.<sup>6</sup> Among the excluded novelty candles are holiday candles, including Christmas candles.

In analyzing holiday novelty candles, including Christmas candles, Commerce asks whether the candle is specially designed for use only in connection with a specific holiday or event. Under the Scope Clarification, Christmas candles must be "specially designed for use only in connection with the Christmas holiday season," and this use must be "clearly indicated by Christmas scenes or symbols depicted in the candle design." Scope Clarification, Pl.'s Ex. 4 at 1. Prior scope rulings indicate that in order to qualify a candle for exclusion, a holiday design must be easily recognizable as a specific holiday image.

If a candle is found to be specially designed for use only in connection with a specific holiday or event, Commerce then determines whether the decorations can be removed without damaging the candle. See *Final Scope Ruling, Endar Corp.* at 4 (July 7, 2000) (explaining Commerce's three-step analysis of holiday novelty candles); see also *Final Scope Ruling, Am. Greetings Corp.* at 6 (May 4, 2000) (stating that Commerce will analyze whether a decoration may be easily removed only after first determining that the candle qualifies as a holiday novelty candle); *Final Scope Ruling, Hallmark Cards, Inc.* at 2 (Sept. 30, 1993) (finding a candle outside the scope of the Order because an engraved poem entitled "Our Wedding" limited its use to weddings and could not be removed without damaging the candle). If a candle's design is specific to a particular holiday or event but is not easily recognizable or is easily removed without damaging the candle, Commerce may still find the candle to be within the scope of the Order.

The holiday novelty exclusion is defined narrowly. See *Russ Berrie & Co., Inc. v. United States*, 23 CIT 429, 440, 57 F. Supp. 2d 1184, 1194 (1999); *Final Scope Ruling, Endar Corp.* at 5 (July 7, 2000). Decorative images must be specific to the holiday; generic and seasonal designs are not grounds for exclusion. See, e.g., *Final Scope Ruling, Endar Corp.* at 4 (July 7, 2000) ("Candles bearing designs or symbols of a general seasonal nature, for example, have not warranted exclusion as holiday novelty candles."); *Final Scope Ruling, Am. Greetings Corp.* at 8 (May 4, 2000) (candles decorated with snowflakes are seasonal and therefore do not qualify as holiday novelty candles); *Final Scope Ruling, Kohl's Dep't Stores, Inc., Def.-Int.'s Ex. 14* at 4 (Aug. 24, 1998) (candle decorated with cherubs, rope, flowers, and vines was within the scope of the Order because these decorations did not symbolize any particular holiday). Nor will colors alone qualify a candle for exclusion. See, e.g., *Springwater Cookie & Confections, Inc. v. United States*, 20 CIT 1192, 1197 (1996)

<sup>6</sup> As noted earlier, the Candles Order excludes the following as novelty candles:

- a) "Christmas novelty candles . . . specially designed for use only in connection with the Christmas holiday season. This use is clearly indicated by Christmas scenes or symbols depicted in the candle design;"
- b) "Candles having scenes or symbols of other occasions (e.g., religious holidays or special events) depicted in their designs;"
- c) "Figurine candles;" and
- d) "Candles shaped in the form of identifiable objects, (e.g. animals or numerals)."

Scope Clarification, Pl.'s Ex. 4 at 1.

("[C]olors *per se* will not exempt a candle from the scope of the anti-dumping order."); *Final Scope Ruling, Institutional Financing Services and Hallmark Cards, Inc.*, Def.-Int.'s Ex. 12 at 3-4 (Apr. 9, 1997) (red and white rounds resembling a peppermint candy were within the scope of the Order). However, Commerce considers all of the characteristics of the candle in combination, and colors and designs that may be insufficient bases for exclusion when considered individually may qualify a candle for exclusion when considered together. *See, e.g., Springwater*, 20 CIT at 1195-96; *Final Scope Ruling, Endar Corp.*, Def.-Int.'s Ex. 9 at 4 (Apr. 7, 1999) ("[B]ecause the design and color combination of this candle (pine cones bunched in the center of green pine branches against a red background) is associated with Christmas, we find that [this candle] qualifies for the holiday novelty candle exclusion."); *see also Final Scope Ruling, Success Sales, Inc.*, Pl.'s Ex. 6 at 3-5 (July 27, 1994) (A packaged set of three candles was found to be a holiday novelty item where two of the three candles were holiday novelty candles, the packaging was labeled "Holiday Pillar Candles," and the set was marketed during the Christmas season); *Final Scope Ruling, Cherrydale Farms Confections at 2-4* (Sept. 9, 1993) (A packaged set of two candles was found to be an excluded holiday novelty item where the candles used bayberry scent and red coloring, one candle was a holiday novelty candle, the non-novelty candle depicted a winter scene, and the packaging was labeled "Holiday Candles.").

### III. The Scope Ruling

#### A. Defendant's Remand Request

As a preliminary matter, the Court notes Defendant's request for the remand of candles 1, 4, 9, 11, and 12 to the Department of Commerce for reconsideration.<sup>7</sup> *See* Def.'s Resp. at 3. The decorative patterns on these candles include holly leaf and berry designs that Commerce determined to be "generic to the winter season" and therefore ineligible for exclu-

<sup>7</sup> The following candles are included in Defendant's remand request:

1. *Christmas Holly Leaf Candle with Berries Candy Cane Pillar* (Item No. 03433)

This candle has red and white diagonal stripes on its sides and a holly leaf and berry design imprinted into its flat top surface. Commerce found this candle to be within the scope of the Order, maintaining that (a) the holly leaf and berry pattern is "generic to the winter season" and is not specific to Christmas; (b) the design on the top surface would quickly melt; and (c) red and white striped "candy cane" candles are not eligible for the holiday novelty exception (citing *Final Scope Ruling, Institutional Financing Services and Hallmark Cards*, Def.-Int.'s Ex. 12 at 4 (Apr. 9, 1997)). *Final Scope Ruling at 4 ¶ 1*, Compl. App. III.

4. *Christmas Holly Leaf Pillar* (Item No. 83136)

This dark green candle has a holly leaf and berry design drawn in white on one side. Commerce found this candle to be within the scope of the Candles Order, ruling that the holly leaf and berry design is "generic to the winter season" and "does not meet the specificity requirements to render a particular candle exempt under of the holiday novelty exemption." *Id.* at 6 ¶ 4.

9. *Christmas Holly Leaf with Berries Candy Cane Column* (Item No. 00016)

This candle is decorated with red, white and green diagonal stripes along its length and a small holly leaf and berry image on one side. Commerce ruled that this candle was within the scope of the Candles Order on the sole ground that the holly leaf and berry motif is not specific to Christmas. *Id.* at 6 ¶ 9.

11. *Christmas Holly Leaf with Berries Pillar* (Item No. 166406)

The body of this red candle is covered with a raised holly leaf and berry design. Commerce found this candle to be within the scope of the Order on the ground that the holly leaf and berry design is "generic to the winter season" and not specific to the Christmas holiday. *Id.* at 6 ¶ 11.

12. *Christmas Patchwork Pillar* (Item No. 15736)

This candle is decorated with a variety of small images, including holly leaves and berries, candy canes, evergreen trees, snow-covered houses, cardinals, stars, reindeer, and multicolored patchwork designs. Commerce ruled that none of the images were "solely specific to the Christmas holiday" and found the candle to be within the scope of the Order. *Id.* at 7 ¶ 12.

sion from the Candles Order as holiday novelty candles. See Final Scope Ruling at 4-7 ¶¶ 1, 4, 9, 11, 12, Compl. App. III. This determination is contrary to *Springwater*, 20 CIT at 1195-96, which stated that holly sprigs are "symbols associated with Christmas," and to Candles Order rulings in which Commerce, following *Springwater*, concluded that the holly leaf and berry design is a symbol of Christmas that qualifies a candle for the holiday novelty exception. See *Final Scope Ruling*, *Avon Products, Inc.*, Def.-Int.'s Ex. 6 at 4 (May 8, 2001); *Final Scope Ruling*, *Dollar Tree Stores, Inc.* at 2-3 (Apr. 9, 1997).

Although Commerce is authorized to alter its prior practice, it must demonstrate that a decision to do so is supported by substantial evidence and in accordance with law. See *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT 173, 184-85, 6 F. Supp. 2d 865, 879-80 (1998) ("Commerce has the flexibility to change its position providing that it explain the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence."). Therefore, the Court will grant the defendant's request and remand candles 1, 4, 9, 11, and 12 to Commerce for reconsideration. The Court further directs Commerce to consider both the cube and pillar versions of candle 12, the Christmas Patchwork candle, in its remand determination.

#### *B. SFCC's Moonlite Candles*

Plaintiff includes in its motion two Moonlite Candles (Itemb No. 213649) that were not submitted to Commerce in the Scope Ruling Request. See Compl. at 8 ¶ 31; Scope Ruling Request, Compl. App. I; Pl.'s Mem. at 32. Absent an agency determination, there is no basis for this Court to exercise jurisdiction in this matter. See 19 U.S.C. § 1516a(a)(2)(B)(vi); *Ericsson GE Mobile Comm., Inc.*, 60 F.3d at 783 ("As the agency charged with administering the antidumping duty program, the Commerce Department is responsible for interpreting the antidumping duty order and determining whether certain products fall within the scope of the order as interpreted."). As Commerce has not had the opportunity to determine whether these candles fall within the scope of the Order, review in this Court is unavailable.

#### *C. Commerce's Determinations in the SFCC Final Scope Ruling*

Candles 2, 3, 5, 6, 8, and 10 remain to be considered by the Court. All are formed in shapes covered by the Order. Plaintiff claims that they should be excluded from the scope of the Order as Christmas novelty candles.

As the agency acknowledged, these candles are decorated with Christmas-specific images, including Santa Claus, Christmas trees, and Christmas stockings. Commerce nevertheless found the candles to be within the scope of the Order, reasoning that: (1) designs were not visible from most or all angles; (2) designs would quickly burn away when the candle was lit; (3) designs were "minimally decorative;" and (4) designs were not easily recognizable as holiday images. See Final Scope



Ruling at 5-6 ¶¶ 2, 3, 5, 6, 8, 10, Compl. App. III. The Court will address Commerce's analysis of each of these candles.

1. *Candles 2 and 3*

Candle 2, the Santa Claus Motif Candy Cane Pillar (Item No. 13403), is decorated with red and white diagonal stripes on its sides and an image of Santa Claus imprinted into the top surface. Similarly, candle 3, the Christmas Tree with Star Candy Cane Pillar (Item No. 73633), has red, white, and green diagonal stripes on its sides and an image of a Christmas tree with a star imprinted into the top surface. Commerce ruled that although the Santa Claus and Christmas tree images are specific to Christmas, the designs are "only discernable when viewed from above," rather than visible from multiple angles, and "would soon melt away once the candle is lit." *Id.* at 5 ¶¶ 2, 3. In both instances, Commerce further asserted that "a minimally decorative design that does not make the product easily identifiable as a novelty candle is not grounds for excluding an item from the Order." *Id.* (citing *Final Scope Ruling, Endar Corp.* at 6 (Jan. 10, 2000)). The Court will consider each of these reasons in turn.

a. *The Design Is Not Visible from Multiple Angles*

Whether a design may be seen from multiple angles has been a regular feature of rulings involving candles formed in the shape of identifiable objects. Commerce has determined that candles are within the scope of the Order where a shape is not clearly identifiable as that of a particular object, or is not identifiable when viewed from multiple angles. *See, e.g., Final Scope Ruling, Meijer, Inc.*, Def.-Int.'s Ex. 8 at 6-7 (Sept. 30, 1999) ("Star Candle" was within the scope of the Order because it was not clearly identifiable as a star or other object when viewed from all sides); *Final Scope Ruling, Endar Corp.*, Def.-Int.'s Ex. 9 at 3-4, 6 (Apr. 7, 1999) ("Gold 5" High Holiday Candle" found within the scope of the Order because it was not clearly identifiable as a star or other object; however, the "Christmas Star Candle" was outside the scope of the Order because it was clearly identifiable as a star when viewed from all sides).

Rulings addressing holiday novelty candles, however, have not previously required that a design be visible from multiple angles. *See Final Scope Ruling, Meijer Inc.* at 4 (Dec. 15, 1997) (finding a candle embossed with the word "Noel" to be a Christmas novelty candle without addressing the issue of visibility from multiple angles); *Final Scope Ruling, Enesco Corp.* at 3 (Oct. 30, 1996) (finding four candles decorated with raised Christmas scenes to be outside the scope of the Order without addressing visibility of the design); *Final Scope Ruling, Watkins, Inc.* at 2 (Feb. 14, 1995) (ruling that a raised relief Christmas design "clearly limit[s] this candle for use in connection with the Christmas holiday season," without addressing visibility from multiple angles); *Final Scope Ruling, Hallmark Cards, Inc.* at 2 (Sept. 30, 1993) (finding a candle engraved with a poem entitled "Our Wedding" outside the scope of the Order because the poem limited its use to weddings and could not be removed without damaging the candle. The design's visibility from mul-

multiple angles was not addressed.). Commerce's holiday novelty analysis, explained in *Final Scope Ruling, Endar Corp.* at 4 (July 7, 2000), does not address the issue of the design's visibility from multiple angles.

Furthermore, a requirement of visibility from multiple angles conflicts with several earlier Candles Order rulings in which Commerce concluded that holiday designs on the lids of wax-filled containers qualified candles for the holiday novelty exception. See *Final Scope Ruling, Kohl's Dep't Stores, Inc.*, Def.-Int.'s Ex. 14 at 6 (Aug. 24, 1998) (ruling that a wax-filled container with a Christmas print on the lid was a Christmas novelty candle and was outside the scope of the Order); *Final Scope Ruling, Cherrydale Farms Confections* at 3 (Sept. 3, 1993) (ruling that a wax filled container with a print titled "Bringing Home the Christmas Tree" on its lid was "limit[ed] \* \* \* to use for Christmas" and was therefore a novelty candle excluded from the scope of the Order); *Final Scope Ruling, Primark Int'l* § 3 (June 9, 1993) (ruling that a wax-filled container with an image of Santa Claus and reindeer on the lid was a Christmas novelty candle and was excluded from the scope of the Order). A container lid is on top of the candle and must be removed entirely prior to use. A design on the lid is not visible either from multiple angles or when the candle is used. Thus, a requirement that a design be visible from multiple angles appears inconsistent with the determination that a design on top of a container lid may exclude a candle from the scope of the Order.

In another context, Commerce has found that designs molded on top of candles and designs that are recognizable only from the top are not grounds for exclusion from the scope of the Order. See, e.g., *Final Scope Ruling, Cherrydale Farms* at 4 (Oct. 5, 2000) (finding that an insect shape molded on top of a candle was insufficient to exclude it from the scope of the Order); *Final Scope Ruling, Endar Corp.*, Def.-Int.'s Ex. 11 at 5 (Jan. 10, 2000) (suggesting that impression of a dragonfly, visible only from the top, would not be sufficient to grant exclusion as a novelty candle. The candle was nevertheless excluded because it was formed in a shape not covered by the Order.). These rulings involved candles formed in the shapes of identifiable objects, however, and Commerce has not previously applied this reasoning to holiday novelty candles. Moreover, like the requirement of visibility from multiple angles, a determination that a holiday design on top of a candle is an insufficient basis for exclusion also appears to conflict with the earlier determinations that holiday designs on the lids of wax-filled containers are sufficient grounds for exclusion. See *Final Scope Ruling, Kohl's Dep't Stores, Inc.*, Def.-Int.'s Ex. 14 at 6 (Aug. 24, 1998); *Final Scope Ruling, Cherrydale Farms Confections* at 3 (Sept. 3, 1993); *Final Scope Ruling, Primark Int'l* § 3 (June 9, 1993).

An interpretation of the Scope Clarification to require a Christmas design to be visible from multiple angles represents a change from Commerce's prior practice. Yet here, Commerce offered no explanation as to

why the interpretation is correct or why Commerce altered its practice. Accordingly, the determination is not in accordance with law.

*b. The Design Would Quickly Burn or Melt Away*

As noted above, Commerce based its determination partly on the conclusion that the Santa Claus and Christmas tree designs imprinted into the top surfaces of candles 2 and 3 would quickly melt away when the candles were lit. See Final Scope Ruling at 5 ¶¶ 2,3, Compl. App. III. Commerce has consistently ruled that a novelty candle may still fall within the scope of the Order if the figurine or other decoration that qualifies the candle for novelty status may be easily removed without damaging the candle. See, e.g., *Final Scope Ruling, Meijer, Inc.* at 5 (June 11, 1998) (candle found outside the scope of the Order where an attached chick figurine could not be removed without damaging the candle); *Final Scope Ruling, Two's Company, Inc.*, Def.-Int.'s Ex. 5 at 4 (Jan. 13, 1995) (candle with attached gold angel figurine was outside the scope of the Order because the figurine could not be removed without damaging the candle).

However, Commerce has not previously determined that a candle is within the scope of the Order because a design would quickly burn or melt away. Moreover, the burning or melting of a design is not equivalent to the easy removal of a figurine or decoration. First, burning or melting a design cannot be achieved without damage to the candle. Second, the question of burning or melting the design requires consideration of the candle's characteristics after consumption, while the question of easy removal of a decoration considers the candle's characteristics prior to consumption. Prior rulings indicate that in determining whether merchandise falls within the scope of an antidumping order, Commerce looks to the condition of merchandise at the time of importation or purchase by the consumer, not at the time of consumption. See, e.g., *Final Scope Ruling, Russ Berrie, Inc.* at 4 (Sept. 25, 1997) ("The issue before the Department \* \* \* is not the disposition of the container after the candle is consumed but, rather, the wax-filled container en toto as it is imported into the United States."); *Final Scope Ruling, Candles by Finesse* at 3 (Mar. 18, 1992) (Spiral candle which left behind a wax sculpture as it burned was within the scope of the Order because "at the time of purchase, [the candle] is not distinguishable in appearance from other spiral candles subject to the Order."). Accordingly, this basis for Commerce's decision is not in accordance with law.

*c. The "Minimally Decorative" Standard*

Commerce characterized the designs on candles 2 and 3, and others discussed *infra*, as "minimally decorative." See Final Scope Ruling at 5 ¶¶ 2, 3, Compl. App. III. The term "minimally decorative" is taken from Commerce's *Final Scope Ruling, Endar Corp.*, Def.-Int.'s Ex. 11 (Jan. 10, 2000), in which Commerce ruled that a candle with a bamboo design that incorporated only one characteristic knot and ribbed joint was not formed in the shape of an identifiable object, and was therefore within the scope of the Order. Commerce stated that "the center joint is only

slightly raised and not easily discernable, and the single knot is not visible from all sides. Therefore, \* \* \* the minimal decorative design does not make this candle easily identifiable as bamboo." *Final Scope Ruling, Endar Corp.*, Def.-Int.'s Ex. 11 at 6 (Jan. 10, 2000).

*Endar* may be interpreted to promulgate a two-prong standard which asks, first, whether the design is easily discernable, and second, whether it is visible from all sides. The first element of this "minimally decorative" standard appears to correspond to an inquiry used in the holiday novelty analysis: whether the design is easily recognizable as a holiday image. See *Final Scope Ruling, Endar Corp.* at 4-5 (July 7, 2000); *Final Scope Ruling, Midwest of Cannon Falls, Inc.* at 3 (Oct. 30, 1996); *Final Scope Ruling, Enesco Corp.* at 3 (Oct. 30, 1996); *Final Scope Ruling, Kohl's Dep't Stores, Inc.*, Def.-Int.'s Ex. 14 at 6 (Aug. 24, 1998). The second element, however, asks whether the decoration is visible from multiple angles. As discussed above, this inquiry has not previously been applied to holiday novelty candles. See *supra* text at pp. 14-18. Absent further explanation, this Court is unable to determine that its use is supported by substantial evidence and in accordance with law. Commerce is therefore directed to evaluate the applicability of this standard to holiday novelty candles.

Assuming, *arguendo*, that the *Endar* ruling promulgates a two-part standard that may be applied to holiday novelty candles, Commerce's application of that standard in the instant case is flawed. In *Endar*, Commerce drew its conclusion that the candle was minimally decorated after a two-step inquiry. In the instant ruling, in contrast, the statement that the design is minimally decorative is simply an assertion, rather than a conclusion derived from examination of the candle's characteristics.<sup>8</sup> In addressing candle 2, the Santa Claus Motif Candy Cane Pillar, Commerce stated,

While the Santa Claus image is specific to the Christmas holiday, it is only discernable when viewed from above and would soon melt away once the candle is lit. In a previous scope ruling, the Department found that a minimally decorative design that does not make the product easily identifiable as a novelty candle is not grounds for excluding an item from the Order.

Final Scope Ruling at 5 ¶ 2, Compl. App. III. This statement does not demonstrate a clear analysis under the two criteria of *Endar*. Although the mention of the Santa Claus image implies that the design is recognizable, and the statement notes that the design is visible only from above, rather than from multiple angles, the decision that the design is minimally decorative, if it is based on any analysis at all, is based partly on a third criterion not found in *Endar*: whether the design will quickly melt.

Similarly, in its analysis of another candle, Commerce said that "[w]hile the image of Santa Claus is specific to the Christmas holiday,

<sup>8</sup> The standard was similarly applied with respect to candles 2, 3, 5, 6, 8, and 10. The analysis discussed here is applicable to all of these candles.

this particular ornamentation is only minimally decorative and not viewable from most angles, and therefore is not grounds for excluding this item from the scope of the Order." *Id.* at 6 ¶ 8. Here, the visibility of the design is mentioned only after describing the candle's design as "minimally decorative." The description of the candle as "minimally decorative" is itself merely an assertion.

In summary, Commerce must determine whether the term "minimally decorative" refers to a two-element standard that is applicable to holiday novelty candles. If so, Commerce must apply the standard in an appropriate manner, "articulat[ing a] rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

*d. The Combined Effect of Colors and Holiday Design*

The Court notes that Commerce omitted any discussion of whether the combination of color patterns and holiday images might bring these candles within the holiday novelty exception. As previously discussed, *see supra* text at pp. 9-10, decorations that provide insufficient grounds for exclusion when considered individually may be sufficient to exclude a candle from the scope of the Order when considered in combination. *See Springwater*, 20 CIT at 1195-96; *Final Scope Ruling, Endar Corp., Def.-Int.'s Ex. 9* at 4 (Apr. 7, 1999). Here, Commerce should evaluate whether the combination of red, white, and green colors, the pattern of diagonal stripes, and the holiday-specific designs may be sufficient to find that these candles are "specially designed for use only in connection with the Christmas holiday season." Scope Clarification, Pl.'s Ex. 4 at 1.

*e. Conclusion*

In accordance with the comments above, Commerce should evaluate whether the requirement of visibility from multiple angles and the related "minimally decorative" standard are properly applicable to candles 2 and 3. Absent some further explanation, Commerce should omit consideration of whether a design would easily burn or melt away, as this is not in accordance with law. Finally, if Commerce determines that the individual decorative characteristics of these candles do not qualify for the holiday novelty exclusion, the agency should assess whether the combined effect of the decorations removes these candles from the scope of the Candles Order.

*2. Candles 5, 8, and 10*

Candle 5, the Christmas Sock Pillar (Item No. 83036) is a white candle with an image of a stocking drawn in red on one side. Candle 8, the Santa Claus Candy Cane Column (Item No. 00016), has red and white diagonal stripes along the body of the candle and a small image of Santa Claus visible on one side. Similarly, candle 10, the Christmas Tree with Star Candy Cane Column (Item No. 00016), has red, white and green diagonal stripes along the body of the candle and a small image of a Christmas tree with a star on one side.

Although Commerce ruled that the Christmas stocking, Santa Claus, and Christmas tree images are specific to the Christmas holiday, all three of these candles were found within the scope of the Order on the grounds that the designs were not visible from most angles and were minimally decorative. See *Final Scope Ruling* at 5-6 ¶¶ 5, 8, 10, Compl. App. III.

As with candles 2 and 3, Commerce must evaluate whether the requirement of visibility from multiple angles and the "minimally decorative" standard are properly applied to holiday novelty candles. Additionally, Commerce should assess whether the combinations of colors, patterns, and Christmas images render these candles "specially designed for use only in connection with the Christmas holiday season." Scope Clarification, Pl.'s Ex. 4 at 1.

### 3. Candle 6

Candle 6, the Santa Claus Pillar (Item No. 82936), is a red candle with a silhouette drawn in white on one side. As with the previous three candles, Commerce held that the design was "minimally decorative" and was not easily viewable from most perspectives. Here, however, Commerce's determination that the candle falls within the scope of the Order rested primarily on the finding that the Santa Claus image is not easily recognizable.

Commerce has previously withheld novelty candle status on the grounds that the decorative design is not identifiable or easily recognizable as a holiday image. See, e.g., *Final Scope Ruling, Endar Corp.* at 6 (July 7, 2000) (ruling that candle decorations that were not recognizable as Christmas trees or holly bushes did not qualify for holiday novelty exception); *Final Scope Ruling, Midwest of Cannon Falls, Inc.* at 3 (Oct. 30, 1996) (ruling that Easter taper candle decorated with Easter eggs was within the scope of the Order because the decoration was not readily identifiable as eggs); cf. *Final Scope Ruling, Kohl's Dep't Stores, Inc.*, Def.-Int.'s Ex. 14 at 6 (Aug. 24, 1998) (finding a wax-filled container to be outside the scope of the Order because the print on the container's lid was "clearly intended to represent Christmas carolers"); *Final Scope Ruling, Enesco Corp.* at 3 (Oct. 30, 1996) (ruling that four candles were outside the scope of the Order because they "are designed for use only in connection with the Christmas holiday season" and "each candle's design contains identifiable features commonly associated with the Christmas season"). Such a requirement is in accordance with the terms of the Scope Clarification, which requires a Christmas novelty candle's holiday use to be "clearly indicated by Christmas scenes or symbols depicted in the candle design." Scope Clarification, Pl.'s Ex. 4 at 1 [emphasis supplied].

The design on candle 6 is an undetailed sketch composed of curving lines. Commerce found the design to be "a stylized outline of what appears to be a head and shoulders." *Final Scope Ruling* at 5 ¶ 6, Compl. App. III. After viewing the candle, we conclude that Commerce's finding is a reasonable construction of the evidence. Accordingly, Commerce's



determination that the design is not easily recognizable as Santa Claus is supported by substantial evidence. As the lack of clarity in the design is sufficient to deny holiday novelty status, the Court does not reach the application of the "viewable from multiple angles" and "minimally decorative" standards in this instance.

#### CONCLUSION

Commerce should reconsider and clarify its reasoning with regard to the subject candles. Pursuant to Defendant's request, candles 1, 4, 9, 11, and 12 are remanded to Commerce for reconsideration. Candles 2, 3, 5, 8, and 10 are remanded to Commerce for further proceedings consistent with this opinion. The determination of the Department of Commerce as to candle 6, the Santa Claus Pillar (Item No. 82936), is affirmed. Plaintiff's claim regarding the Moonlite Candles (Item No. 213649) is dismissed for lack of jurisdiction.

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(Slip Op. 02-48)

KAO HSING CHANG IRON & STEEL CORP., PLAINTIFF, AND ACI CHEMICALS, INC., AND YU DIN STEEL CO., LTD., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND WHEATLAND TUBE CO., DEFENDANT-INTERVENOR

Consolidated Court No. 00-01-00026

Plaintiff foreign exporter brought action contesting final results of administrative review of antidumping order covering carbon steel pipe from Taiwan. United States Court of International Trade, Eaton, J. Held: United States Department of Commerce's ("Commerce") determination that use of facts available was warranted as to Plaintiff was not supported by substantial evidence on the record because, contrary to Commerce's findings, Plaintiff sought clarification of questionnaire instructions, notified Commerce of difficulties in submitting requested information, and timely submitted responses.

[Antidumping determination remanded to Commerce.]

(Dated May 30, 2002)

*Ablondi, Foster, Sobin & Davidow, P.C.*<sup>1</sup> (*F. David Foster and Kristen S. Smith*), for Plaintiff.

*Holland & Knight, LLP* (*Frederick P. Waite and Kimberly R. Young*), for Plaintiff-Intervenors.

*Robert D. McCallum, Jr.*, Deputy Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Velta A. Melnbrensis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Stephen M. DeLuca*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

*Schagrin Associates* (*Roger B. Schagrin, Nicholas A. Kessler, Andrew B. Knapp, Brian E. McGill, and Roger Banks*), for Defendant-Intervenor.

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<sup>1</sup> *Ablondi, Foster, Sobin & Davidow, P.C.*, merged with *Miller & Chevalier*, Chartered, in July of 2001.

## OPINION

EATON, *Judge*: This matter is before the court on the motion of Plaintiff Kao Hsing Chang Iron & Steel Corporation ("KHC") for judgment upon the agency record pursuant to USCIT R. 56.2. KHC contests the results of the United States Department of Commerce's ("Commerce") sixth administrative review of the antidumping order<sup>2</sup> covering carbon steel pipe from Taiwan contained in *Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 69,488 (Dec. 13, 1999) ("*Final Results*"), amended by *Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan; Amended Final Results of Antidumping Duty Administrative Review*, 65 Fed. Reg. 5,310 (Feb. 3, 2000) ("*Am. Final Results*"). The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1994) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (1994). Where a party challenges the findings of an antidumping review the court will hold unlawful "any determination, finding, or conclusion found \* \* \* to be unsupported by substantial evidence on the record, or otherwise not in accordance with law \* \* \*." 19 U.S.C. § 1516a(b)(1)(B)(i). For the reasons set forth below, the court remands this matter to Commerce with instructions to conduct further proceedings in conformity with this opinion.

## BACKGROUND

On May 29, 1998, at the request of Allied Tube & Conduit Corp., Wheatland Tube Company, Sawhill Tubular Division of Armco, Inc., and Laclede Steel Co. (jointly "Petitioners"), Commerce initiated an administrative review of the order covering the subject imports for the period of May 1, 1997, through April 30, 1998. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 63 Fed. Reg. 35,188 (June 29, 1998). As part of its investigation, Commerce issued its standard questionnaire to KHC.<sup>3</sup> (See questionnaire of 7/10/98 ("Questionnaire"), Pub. R. Doc. 5, Attach.) Although initially not required to respond to questions concerning costs of production as set out in section D of the Questionnaire, Commerce notified KHC that it might be instructed to do so in the future. (Letter from Commerce to law firm of Dickstein Shapiro & Morin of 7/10/98, Pub. R. Doc. 5 at 2.) KHC responded to section A of the Questionnaire on August 7, 1998, and sections B and C on September 4, 1998.

<sup>2</sup> See *Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Antidumping Duty Order*, 49 Fed. Reg. 19,369 (May 7, 1984). By this order KHC's weighted average antidumping duty margin was calculated as 9.7 percent for the subject merchandise. *Id.* at 5,311. Administrative reviews of this order were conducted for the periods of: 1983-84, see 51 Fed. Reg. 43,946 (Dec. 5, 1986) (final results), amended by 53 Fed. Reg. 51,128 (Dec. 20, 1988); 1985-86, see 53 Fed. Reg. 41,218 (Oct. 20, 1988) (final results), amended by 54 Fed. Reg. 1,752 (Jan. 17, 1989); 1986-87, see 54 Fed. Reg. 46,432 (Nov. 3, 1989) (final results); 1987-88, see 56 Fed. Reg. 8,741 (Mar. 1, 1991) (final results); and 1995-96, see 62 Fed. Reg. 62,971 (Oct. 10, 1997) (final results). KHC's margin was reviewed for the periods of 1985-86 (finding zero percent margin) and 1986-87 (adopting 1985-86 margin due to no shipments during POR). In addition, Commerce conducted an expedited sunset review of the subject merchandise, in which it noted KHC's margin, as calculated in the antidumping order, was 9.7 percent. See *Final Results of Expedited Sunset Review: Small Diameter Carbon Steel Pipes and Tubes from Taiwan*, 64 Fed. Reg. 67,873, 67,875-76 (December 3, 1999).

<sup>3</sup> The relevant questionnaire sections are: A (general information); B (comparison market sales-sales in the home market or to third countries); C (sales to the United States); and D (cost of production/constructed value).

(Letters from law firm of Ablondi, Foster, Sobin & Davidow ("AFS&D") to Commerce of 9/4/98, Pub. R. Docs. 20, 32.<sup>4</sup>)

Thereafter, in response to Petitioners' further allegations that "KHC made home market sales below the cost of production \* \* \* during the POR," *Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Prelim. Results of Antidumping Duty Admin. Review and Partial Rescission of Review*, 64 Fed. Reg. 30,306, 30,307 (June 7, 1999) ("Prelim. Results"), Commerce "initiated an investigation of sales below cost," *id.*, and instructed KHC to respond to section D of the Questionnaire. (Letter from Commerce to AFS&D of 10/20/98, Pub. R. Doc. 46.) In connection with this request, Commerce provided KHC with general instructions for answering the questions found in section D relating to cost of production ("COP")<sup>5</sup> and constructed value ("CV").<sup>6</sup> These instructions provided guidance as to how various computer data fields were to be labeled and completed so that COP and CV could be calculated. (Questionnaire section D, Pub. R. Doc. 5, Attach. at D-10-19.) For COP and CV data, Commerce directed KHC to report "the quantity produced during the cost calculation period" in a data field labeled "PRODQTY" for each model identified by an individual model control number ("CONNUM"). (See *id.* at D-13, 19 (emphasis added).) KHC filed its section D response on December 4, 1998, after asking for and receiving an extension of time to do so. (See letters from Commerce to AFS&D of 11/17/98, Pub. R. Doc. 53A (granting extension of time to Dec. 4, 1998), and 12/7/98, Pub. R. Doc. 56 (referencing filing of preliminary business proprietary version on December 4, 1998).)

Commerce, after reviewing KHC's section D submission and receiving comments from interested parties thereon, sent a supplemental questionnaire to KHC. (See letter from Commerce to AFS&D of 1/21/99, Pub. R. Doc. 66.) Among other things, Commerce instructed KHC to, "As previously requested, report the quantity produced during the cost calculation period in the field labeled 'PRODQTY' within your COP and CV databases." (Supplemental questionnaire of 1/21/99 ("First Supplemental Questionnaire"), Pub. R. Doc. 66, Attach. at ¶ 47 (emphasis added).) Commerce did not, however, more specifically detail the nature of the deficiency. (See generally First Supplemental Questionnaire, Pub. R. Doc. 66, Attach.) KHC timely filed its response to the First Supplemental Questionnaire (see letter from AFS&D to Commerce of 2/16/99, Conf. R. Doc. 16) after asking for and receiving an extension of time (see letter from Commerce to AFS&D of 2/3/99, Pub. R. Doc. 70 (granting extension of time to February 16, 1999)). In this response, KHC stated: "As requested, KHC is reporting the quantity produced during the cost cal-

<sup>4</sup> The law firm of Dickstein Shapiro & Morin withdrew as attorney of record for KHC on July 24, 1998 (Pub. R. Doc. 13), after which the law firm of Ablondi, Foster, Sobin & Davidow entered its appearance on July 28, 1998 (Pub. R. Doc. 14).

<sup>5</sup> "Cost of production" was defined as "the total model-specific cost of the foreign like product sold by your company in the foreign market." (Questionnaire section D, Pub. R. Doc. 5, Attach. at D-1.)

<sup>6</sup> "Constructed value" was defined as "the total model-specific cost of the subject merchandise sold by your company to the U.S. market, plus an amount for profit." (Questionnaire section D, Pub. R. Doc. 5, Attach. at D-1.)

ulation period in the field labeled 'PRODQTY' within its revised COP and CV databases \* \* \*." (First Supplemental Questionnaire Resp., Pub. R. Doc. 77, Attach. at 43 (emphasis added).)

After receiving and reviewing the First Supplemental Questionnaire Response, Commerce notified KHC that the information provided therein was deficient, and directed it to complete another supplemental questionnaire. (Letter from Commerce to AFS&D of 3/16/99, Pub. R. Doc. 86.) In this communication, for the first time, Commerce clearly stated that KHC had not provided requested information:

For a large number of CONNUMs, including CONNUMs for which sales are reported in the sales response, data for the field "PRODQTY" is not provided. As requested in our original and supplemental questionnaire, report the *quantity produced during the cost calculation period* in the field labeled "PRODQTY" within your COP and CV databases.

(Supplemental questionnaire of 3/16/99 ("Second Supplemental Questionnaire"), Pub. R. Doc. 86, Attach. at ¶ 10(e) (emphasis added).)

Before submitting its response, KHC sought to address the issues raised by the Second Supplemental Questionnaire. To this end KHC contacted Commerce and, on March 23, 1999, a meeting was held between counsel for KHC and Commerce officials.<sup>7</sup> (See affidavit of F. David Foster, Pl.'s Mem. Supp. Mot. J. Agency R., Attach. 5 ("Foster Aff."); affidavit of Johnny Chiu, Pl.'s Mem. Supp. Mot. J. Agency R., Attach. 6.) At this meeting counsel for KHC stated that KHC's sales during the period of review included merchandise produced both prior to the period of review—i.e. from inventory—and during the period of review. (Foster Aff. at ¶ 4.) KHC's counsel explained that, since Commerce requested information only for quantities produced during the cost calculation period, no production quantity data had been provided for merchandise sold from inventory. (*Id.*) KHC's counsel suggested that, with respect to data for merchandise sold from inventory, "costs reported for the product most similar to a product not produced during the review period could be used as surrogate costs for the product not produced" as this "was normal ITA practice in situations such as KHC's." (*Id.* at ¶ 5.) Commerce did not consent to KHC's proposed method but, instead, indicated that the use of surrogate cost data would depend on a number of factors, including the relative similarity of the surrogate merchandise and estimated value of U.S. sales involved. (*Id.* at ¶ 6.) At no point did Commerce state, however, that KHC's use of such methodology was unacceptable or, alternatively, suggest any other approach. (*Id.* at ¶ 7.)

After this meeting, KHC requested and was granted an extension of time to respond to the Second Supplemental Questionnaire. (See letter from Commerce to AFS&D of 4/8/99, Pub. R. Doc. 102 (granting exten-

<sup>7</sup> A memorialization of this meeting was not initially included as part of the administrative record. The court granted Plaintiff's motion to include two affidavits in the record describing the events that transpired during that meeting. See *Kao Hsing Chang Iron & Steel Corp. v. United States*, 25 CIT \_\_\_, Slip Op. 01-51 (Apr. 19, 2001) (granting Plaintiff's motion to amend administrative record). There is no dispute that these affidavits, now part of the administrative record, accurately reflect the substance of that meeting. *Id.*, 25 CIT at \_\_\_, Slip. Op. 01-51 at 2.

sion of time to April 12, 1999).) KHC then timely filed its response to the Second Supplemental Questionnaire (Second Supplemental Questionnaire Resp. of 4/12/99, Pub. R. Doc. 105, Attach) explaining that it had:

reported the quantity produced during the cost calculation period in the field labeled "PRODQTY" in the COP and CV databases. For some U.S. and home market sales (about 5% of the sales records in both the U.S. and home market data sets), there was no production during the POR; sales were from inventory. Exhibit 6 hereto sets forth those product numbers/CONNUMS where this is the case, and indicates for each such case the control number/CONNUM which is closest in characteristics for which production did occur, and whose costs KHC believes closely represents the costs of such product if it had been produced.

(*Id.*, Pub. R. Doc. 105, Attach. at 11.) Exhibit 6<sup>8</sup> was a printed chart with handwritten notations of CONNUMs with "U.S. sales with no POR production, and closest product with production," and CONNUMs with "Home market sales with no POR production, and closest product with production." (See Second Supplemental Questionnaire Resp., Conf. R. Doc. 24, Attach. at Ex. 6.)<sup>9</sup> After filing the Second Supplemental Questionnaire Response KHC received no further inquiries or requests for information from Commerce. (Pl.'s Mem. Supp. Mot. J. Agency R. at 6.)

Commerce then published the *Preliminary Results*. Therein, it explained that the use of facts available as to certain merchandise was warranted because KHC "failed to provide any costs for certain models," *Preliminary Results*, 64 Fed. Reg. at 30,308, and "failed to provide any constructed value data for certain models \* \* \*." *Id.* Therefore, for both cost of production and constructed value Commerce used the "highest average cost for the same category of product." *Id.*

On December 13, 1999, Commerce published the *Final Results*. Therein, it explained that "[w]here KHC failed to provide cost data, [Commerce] used the highest average costs of models for which KHC did provide data. The facts \* \* \* used constitute partial adverse facts available, and are also the least adverse facts available on the record." *Final Results*, 64 Fed. Reg. at 69,489. Commerce explained that the use of facts available was warranted because:

KHC withheld information requested by the Department, then belatedly offered different information, which did not fulfill the request, in an unacceptable format. \* \* \* KHC did not consult the Department on this matter, and did not explain its omission of quantity or cost data until its April 13, 1999 addendum to its April 12, 1999 supplemental response, where it mentioned in passing that the models were not produced during the POR.

*Id.* (emphasis added). In addition, Commerce found that:

<sup>8</sup> Exhibit 6 as filed on April 12, 1999, contained information deemed incorrect by KHC and was subsequently replaced. (See letter from AFS&D to Commerce of 4/13/99, Pub. R. Doc. 104 at 2.)

<sup>9</sup> The chart, which cross-referenced CONNUMs of merchandise sold from inventory with CONNUMs of merchandise produced during the period of review, did not provide specific production quantity data for CONNUMs sold from inventory.

KHC chose to ignore both the instructions in the questionnaire \* \* \* and basic statutory guidelines: [19 U.S.C. § 1677m(c)(1)] requires that an interested party promptly notify the Department if it is unable to submit information in the form and manner requested, and that it provide a "full explanation and suggested alternate forms" in which it is able to provide the information. KHC provided no such notification or explanation.

*Id.* at 69,490. Commerce explained that it used adverse inferences because:

the facts we used are only partial adverse facts available and are the least adverse verified facts available on the record which would not reward non-compliance. Rather than applying the highest calculated margin for the sales with unreported cost data, we simply inserted the highest costs in order to complete the costs test and leave the price-to-price analysis intact. We have relied upon KHC's own verified data as our source of facts available. Use of costs other than those we have used, such as KHC's overall, non-product specific average costs, could reward KHC for failure to fully cooperate in this review because use of such data could potentially result in a lower margin than would have resulted from use of KHC's actual costs. Our application of partial adverse facts available in this manner is consistent with established practice because it is based on verified data and is sufficiently adverse to induce KHC's cooperation in future reviews.

*Id.* After correcting certain ministerial errors, Commerce set KHC's antidumping duty margin at 24.80 percent. *Am. Final Results*, 65 Fed. Reg. at 5,311.

#### DISCUSSION

KHC raises several issues in support of its motion. First, it argues that Commerce improperly resorted to the use of facts available because Commerce did not provide KHC with an adequate opportunity to correct deficiencies in its filings. Next, KHC contends that, even if the use of facts available were warranted, Commerce improperly resorted to the use of adverse inferences because KHC acted to the best of its ability to comply with Commerce's requests. Finally, KHC argues that the adverse inferences selected by Commerce from facts available were not in accordance with law because they were punitive in nature.<sup>10</sup>

The United States ("Government"), on behalf of Commerce, claims that the *Final Results* are supported by substantial evidence on the record and otherwise in accordance with law. The Government argues that the use of partial facts available was warranted because KHC failed

<sup>10</sup> Plaintiff-Intervenors contend that since Yu Din's antidumping margin was "linked" to KHC's, if KHC's margin is adjusted then Yu Din's must be as well. (See Pl.-Intervenors' Mem. Supp. Mot. J. Agency R. at 2.) Yu Din's margin was "linked" to KHC's because it "did not respond to [Commerce's] requests for information and [was] assigned, as facts available, the highest rate in any segment of this proceeding \* \* \*," see *Am. Final Results*, 65 Fed. Reg. at 5,310, and KHC's margin was the highest calculated rate. *Id.* at 5,311. The Government agrees with Plaintiff-Intervenors, stating that "in the event this Court remand[s] KHC's action to Commerce to redetermine KHC's margin and KHC's current margin was ultimately discredited, that Yu Din's margin should be reconsidered as well because it has challenged the facts available margin in the current review. However, Commerce need \* \* \* revise Yu Din's margin only if KHC's margin is disqualified in a final court determination following a remand in KHC's action." (Def.'s Mem. Opp'n to Pl.-Intervenor's Mem. Supp. Mot. J. Agency R. at 3.)



to submit COP and CV data for several models and, in addition, that the data KHC did submit was properly rejected by Commerce because it was not usable. The Government further argues that Commerce's selection of adverse inferences was proper since Commerce is allowed great discretion in selecting such inferences from facts otherwise available, and here those inferences selected were not punitive in nature but, rather, furthered the interests of the antidumping laws.

In order to be found proper, Commerce's findings must be supported by substantial evidence. See 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938); *Daewoo Elecs. Ltd. v. United States*, 6 F.3d 1511, 1520 (Fed. Cir. 1993). In reviewing an agency's findings the court must determine "whether the evidence and reasonable inferences from the record support the [agency's] finding." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Finally, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *Daewoo*, 6 F.3d at 1520 ("The questions is whether the record adequately supports the decision of the [agency], not whether some other inference could reasonably be drawn."). Here, Commerce's conclusions supporting its use of facts available was warranted are not supported by substantial evidence.<sup>11</sup>

First, the conclusion that KHC "withheld information requested by the Department, then belatedly offered different information, which did not fulfill the request, in an unacceptable format," *Final Results*, 64 Fed. Reg. at 69,489, is not supported by the record. The information KHC allegedly "withheld" is the PRODQTY data for CONNUMs sold from inventory. The clear wording of the questionnaire instructions, however, directed KHC to supply PRODQTY data for CONNUMs *produced* during the cost calculation period. While it may have been Commerce's intention to request PRODQTY data for all CONNUMs *sold* during the cost calculation period, this was not made clear to KHC until it received the Second Supplemental Questionnaire, thus prompting KHC to request the meeting that was held on March 23, 1999. In addition, KHC did not "belatedly" offer this information to Commerce. KHC informed Commerce of the difficulties it was having reconstructing the PRODQTY data for CONNUMs sold from inventory nearly three weeks prior to the April 12 deadline for the submission of the Second Supplemental Questionnaire response.

Next, the conclusion that KHC failed to provide requested information, in that it "did not consult the Department on [the submission of surrogate data], and did not explain its omission of quantity or cost data

<sup>11</sup> It is unclear whether Commerce based its use of facts available on KHC's alleged withholding of information pursuant to 19 U.S.C. § 1677e(a)(2)(A), or failure to provide information pursuant to 19 U.S.C. § 1677e(a)(2)(B). Whatever the basis, however, the court finds Commerce's conclusions are not supported by the record.

until its April 13, 1999 addendum \* \* \* where it mentioned in passing that the models were not produced during the POR," *Final Results*, 64 Fed. Reg. at 69,489, is not in accord with the evidence now on the record. Following receipt of the Second Supplemental Questionnaire, KHC's counsel sought a meeting with Commerce officials and, on March 23, 1999, such meeting took place. (Foster Aff. at ¶ 2.) At that time KHC's counsel consulted with Commerce officials about the missing data, explained to them why the data had not been provided, and sought guidance from them as to how to comply with the data request. (See *id.* at ¶¶ 4-5.) Moreover, Commerce's further contention that KHC failed to comply with statutory and regulatory guidelines is also not in accordance with the record. In support of this conclusion Commerce stated:

KHC chose to ignore both the instructions in the questionnaire \* \* \* and basic statutory guidelines: [19 U.S.C. § 1677m(c)(1)] requires that an interested party promptly notify the Department if it is unable to submit information in the form and manner requested, and that it provide a "full explanation and suggested alternate forms" in which it is able to provide the information. KHC provided no such notification or explanation.

*Final Results*, 64 Fed. Reg. at 69,490. The record, however, shows that KHC, after receiving the Second Supplemental Questionnaire—which for the first time alerted it to the nature its response's deficiencies—promptly notified Commerce that it needed clarification of the instructions and was having difficulty providing the requested information. (Foster Aff. at ¶ 4.) KHC also explained why it had not previously supplied such data, and suggested an arguably reasonable means for completing the COP and CV databases with surrogate data. (*Id.* at ¶ 5.)

Therefore, because Commerce's findings in the *Final Results* are not based on the evidence on the record, its determination that the use of facts available was warranted as to KHC in the *Final Results* is not supported by substantial evidence.

#### CONCLUSION

The court remands this action so that Commerce may conduct further proceedings in conformity with this opinion, including consulting with KHC to develop an acceptable method for providing missing production quantity data for KHC's COP and CV databases. Such remand results are due within ninety days from the date of this opinion. KHC shall have thirty days thereafter within which to file comments and Commerce may reply to any such comments within eleven days of their filing.

(Slip Op. 02-49)

ORLEANS INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 01-00576

[Defendant's motion to dismiss for lack of subject matter jurisdiction is granted.]

(Dated June 3, 2002)

*Barnes, Richardson & Colburn (Alan Goggins)*, New York, N.Y., for Plaintiff.*Robert D. McCallum, Jr.*, Assistant Attorney General of the United States; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Aimee Lee*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of Counsel; *Frank Martin*, Office of the General Counsel, U.S. Department of Agriculture, of Counsel, for Defendant.

## OPINION

CARMAN, *Chief Judge*: Defendant, United States, moves to dismiss this consolidated action<sup>1</sup> for lack of subject matter jurisdiction pursuant to USCIT R. 12(b)(1). Plaintiff, Orleans International Inc. ("Orleans") opposes Defendant's motion, asserting this Court has subject matter jurisdiction under 28 U.S.C. § 1581(i)(1), (2) and (4) (2000). For the reasons that follow, this Court dismisses this action for lack of subject matter jurisdiction.

## I. BACKGROUND

Orleans commenced the underlying action to challenge the constitutionality of assessments applied to imports of beef and related beef products pursuant to the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901-11 (2000).<sup>2</sup> The Beef Act was enacted by Congress because it was determined to be:

in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.

7 U.S.C. § 2901(b).

The Beef Act directs the Secretary of Agriculture to promulgate a Beef Promotion and Research Order (the "Order"). See 7 U.S.C. § 2903. The

<sup>1</sup> *Pierce Trading International v. United States*, Court No. 01-00696 and *A.S.C.-Meyner Company v. United States*, Court No. 01-00611, two cases raising identical issues, were consolidated under *Orleans International, Inc. v. United States*, Consolidated Court No. 01-00576, pursuant to court order dated December 13, 2001.

<sup>2</sup> Orleans claims the beef assessments are unconstitutional for two reasons: (1) the assessments violate the Plaintiff's First Amendment rights to free speech and assembly, in a manner similar to the mushroom fee held unconstitutional in *United States v. United Foods, Inc.*, 121 S. Ct. 2334 (2001); and (2) the assessments constitute an unjust taking of its property under the Takings Clause of the Fifth Amendment to the Constitution.

Order established the Cattlemen's Beef Promotion and Research Board (the "Board") and the Beef Promotion Operating Committee (the "Operating Committee"). See 7 U.S.C. § 2904; 7 C.F.R. §§ 1260.141, 1260.161 (2001). The Operating Committee develops "plans or projects of promotion and advertising, research, consumer information, and industry information, which [are] paid for with assessments collected by the Board." 7 U.S.C. § 2904(4)(B).

The assessments used to pay for these projects are collected on both domestic sales and imports. Domestic purchasers "making payment to a producer for cattle purchased from the producer [are required to] \* \* \* collect an assessment and remit the assessment to the Board." 7 U.S.C. § 2904(8)(A). Importers "of cattle, beef, and beef products into the United States [are required to] pay an assessment to the Board through the U.S. Customs Service." 7 C.F.R. § 1260.172(b)(1). The rate of assessment is "one dollar (\$1) per head of cattle" or "the equivalent thereof" for beef and beef products. 7 C.F.R. § 1260.172(a)(1), (2) & (b)(2).

Orleans has imported beef products into the United States from time to time since 1986 and has paid the assessments prescribed by the Beef Act upon its imports of beef products. Orleans timely instituted this action to contest the constitutionality of the beef assessments, pleading jurisdiction under 28 U.S.C. § 1581(i)(1), (2) & (4). Defendant subsequently moved to dismiss this action for lack of jurisdiction.

## II. DISCUSSION

### A. Contentions of the Parties

#### 1. Defendant

Defendant makes three principal arguments in support of its motion to dismiss for lack of jurisdiction. First, Defendant argues 28 U.S.C. § 1581(i)(1) is not applicable because this action does not "arise out of any law of the United States providing for—(1) revenue from imports or tonnage." Defendant contends the purpose of the Beef Act is to regulate and strengthen the beef industry, not to raise revenue for the United States Treasury. The monies collected from the assessments are designed to pay for projects of promotion, advertising, research, consumer and industry information for the beef industry.

Second, Defendant contends the Court has no jurisdiction over this action pursuant to 28 U.S.C. § 1581(i)(4) because the Plaintiff is not complaining about Customs' "administration and enforcement with respect to the matters referred to in" the other subsections conferring jurisdiction on the Court. Here, Orleans is not contesting the collection of the assessment by Customs, but rather the constitutionality of the assessment itself. Therefore, Defendant asserts jurisdiction is not proper under this section.

Finally, Defendant contends jurisdiction is improper under 28 U.S.C. § 1581(i)(2). The United States argues that subsection (i)(2) creates two requirements that Plaintiff does not meet. First, the action must arise directly out of an import transaction or involve a matter of international trade law. Defendant argues this action does not arise directly out of im-

port transactions because the Beef Act assessment is imposed equally on imports and domestic sales of beef. Thus, according to Defendant, the assessment is payable because of a transaction involving a sale of beef or beef products, not as a result of the importation of the merchandise. The United States argues further that the Beef Act is not an international trade law or a statute governing import transactions but rather an agricultural statute enacted to promote the beef industry. Defendant posits the statute's only connection to imports is that the assessment applies both to domestic sales and imports.

Second, the Court of International Trade ("CIT") must have exclusive jurisdiction over the action. Defendant argues the Beef Act does "not involve questions of classification, valuation or rate of duty," matters over which the CIT does have exclusive jurisdiction. Therefore the Beef Act "should be treated the same whether a court is dealing with domestic or imported goods and more appropriately should come within the jurisdiction of the district courts." H.R. REP. NO. 96-1235, at 47-8 (1980), *reprinted in* 1980 U.S.C.A.N. 3729, 3759. Additionally, Defendant points out that the Beef Act already vests the district courts with jurisdiction to enforce violations of the Beef Act, and the constitutionality of the Act has been addressed by the district court in earlier cases and is presently under consideration in two other district courts. Thus, if the CIT assumes jurisdiction because the assessments at issue here involve imports, the CIT must also assume jurisdiction over domestic sales for the jurisdiction to be exclusive. Finally, the United States argues that Congress' failure explicitly to grant jurisdiction to the CIT over this type of action (as it did in connection with the Harbor Maintenance Tax ("HMT")) means the CIT does not have exclusive jurisdiction over these cases.

## 2. Plaintiff

Plaintiff, Orleans, makes three principal arguments in support of its contention that the CIT possesses jurisdiction under 28 U.S.C. § 1581(i) to entertain this action. First, Plaintiff argues this action arises directly from an import transaction. Plaintiff posits that the assessment fees are identical to the duties, merchandise processing fees and harbor maintenance fees paid on the same import transaction. Further, Congress intended the CIT to have jurisdiction under § 1581(i) with regard to any civil action concerning any duty, tax, fee, interest or charge payable to Customs upon import. Thus, because the beef assessment fee is similar to fees considered Customs duties, Orleans contends the beef assessment fee should be treated as a Customs duty and subject to judicial review by the CIT. Plaintiff argues it is challenging the constitutionality of the beef assessment only as applied to Plaintiff's imports, not as applied to domestic sales. Therefore the question presented is directly related to the importation of merchandise and jurisdiction under § 1581(i) is proper.

Second, Plaintiff contends the CIT may claim exclusive jurisdiction over the constitutional challenge to the Beef Act in relation to imports.

Orleans argues Defendant ignores that this action only concerns the Beef Act as applied to imports of beef and beef products, not as applied to domestic sales of beef and beef products—an issue currently pending in the district courts.

Plaintiff contends the plain language of 7 U.S.C. § 2908(b) grants jurisdiction to the district courts only for the enforcement and prevention of violations of the Act, not to review the constitutionality of the Act. Since there is no violation or enforcement issue here, Plaintiff argues the CIT may address the constitutionality of the Act as applied to imports.

Plaintiff, citing the Supreme Court decision in *K Mart Corporation v. Cartier*, 485 U.S. 176 (1988), argues that the district courts are divested of jurisdiction if an action falls within one of the specific grants of exclusive jurisdiction to the CIT. Here, Plaintiff claims because this action falls within the scope of § 1581(i) the CIT, not a district court, should have jurisdiction. To place jurisdiction over this matter in the district court would create the type of confusion that Congress sought to remedy when it enacted the Customs Court Act of 1980.

Plaintiff also refutes Defendant's argument that Congress could have explicitly granted the CIT jurisdiction as it did with respect to the HMT. Plaintiff argues that the language in the HMT Act was necessary to provide jurisdiction in the CIT with regard to several non-import aspects of the HMT.

Third, Plaintiff argues that if the Court decides jurisdiction properly resides in the district court, the appropriate remedy is to transfer the case to the district court rather than to dismiss the action.

## B. Analysis

### 1. Jurisdiction

When a defendant challenges the Court's jurisdiction, the plaintiff has the burden of establishing that jurisdiction exists. *See Iowa, Ltd. v. United States*, 561 F. Supp. 441, 443 (Ct. Int'l Trade 1983). The primary jurisdictional authority for the CIT resides in 28 U.S.C. § 1581(a)–(i). Plaintiff pleads jurisdiction under § 1581(i)(1), (2) and (4).<sup>3</sup>

Because a fee payable upon importation is at issue, it might appear this Court would have jurisdiction over Plaintiff's claims. Nevertheless, Congress explicitly vested jurisdiction under the Beef Act with the district courts. *See* 7 U.S.C. § 2908(b). Furthermore this Court finds that it

<sup>3</sup>The residual jurisdictional provision of the Court, 28 U.S.C. § 1581(i), states in pertinent part:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (i) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;  
(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.



may not assume jurisdiction pursuant to § 1581(i) because such jurisdiction would not be exclusive.<sup>4</sup>

The Court finds its jurisdiction over this action would not be exclusive for two reasons. First, 7 U.S.C. § 2908(b) specifically vests the district courts with jurisdiction "to enforce, and to prevent and restrain a person from violating, an order or regulation made or issued" under the Beef Act. Plaintiff argues that 7 U.S.C. § 2908(b) provides the district court with jurisdiction only to enforce the Beef Act, not to review the constitutionality of the Beef Act. This argument is illogical. In order for the courts to enforce a law, that law must be constitutional. Therefore, jurisdiction to enforce a law necessarily presumes the court's power to determine the law's constitutionality. The "jurisdictional conflict" that Plaintiff claims would arise if 7 U.S.C. § 2908(b) were read to create jurisdiction for this action in the district court would actually arise if two different courts were to have jurisdiction to review the constitutionality of the same act. There is no reason to presume Congress wanted to split jurisdiction, placing enforcement and collection actions in one court and importers' suits over the viability of the Beef Act in another.

Furthermore, the constitutionality of the Beef Act has already been considered by two district courts, see *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *United States v. Frame*, 658 F. Supp. 1476 (E.D. Pa. 1987), *aff'd*, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), and is currently under review by two additional district courts. See *Livestock Mktg. Ass'n, et al. v. USDA, et al.*, Court No. 00-1032 (D. S.D.); *Charter v. USDA*, Court No. 00-198-BLG-RFC (D. Mont.). Two separate Courts of Appeals' affirmances and the Supreme Court's denial of certiorari belie the notion that the district courts are an improper forum for these actions. This Court holds that it has no jurisdiction over this action under 28 U.S.C. § 1581(i).

## 2. Orleans' Request for Transfer to the District Court

Finally, the Court will address Orleans' request to transfer the case to the appropriate district court. Transfer for lack of jurisdiction is governed by 28 U.S.C. § 1631, which provides in pertinent part:

Whenever a civil action is filed in a court \* \* \* and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action \* \* \* to any other such court in which the action \* \* \* could have been brought at the time it was filed \* \* \*.

28 U.S.C. § 1631 (2000). The Supreme Court has stated that "[t]he statute confers on the [federal courts] authority to make a single decision upon concluding that it lacks jurisdiction—whether to dismiss the case

<sup>4</sup> In its discussion of the Customs Court Act of 1980, Congress made it clear that once granted, jurisdiction over a specific action would be exclusive to the CIT:

Subsection (i) is intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provisions of law. \* \* \* This provision makes it clear that all suits of the type specified are properly commenced only in the [CIT].

H.R. REP. NO. 96-1235, at 47 (1980), *reprinted in* 1980 U.S.C.A.N. 3729, 3759 (emphasis added).

or, 'in the interest of justice,' to transfer it to a court \* \* \* that has jurisdiction." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). There are two common reasons for transfer that meet the requirements of 28 U.S.C. § 1631: (1) a statute of limitations problem, and (2) deprivation of a forum. See, e.g., *AT, Inc. v. United States*, 24 F. Supp. 2d 399, 400 (M.D. Pa. 1998) (statute of limitations); *O'Neal v. Hatfield*, 921 F. Supp. 574, 576 (S.D. Ind. 1996) (same); *Old Republic Ins. Co. v. United States*, 741 F. Supp. 1570, 1576 (Ct. Int'l Trade 1990) (forum). Since there has been no allegation of a statute of limitations problem and the denial of the request to transfer will not deprive Plaintiff of a forum, the Court finds it is not "in the interest of justice" to transfer this case to the district court.

### III. CONCLUSION

For the reasons stated above, the Court grants Defendant's motion to dismiss this action for lack of subject matter jurisdiction.

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(Slip Op. 02-50)

REINER BRACH GMBH & CO. KG AND NOVOSTEEL SA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP. AND UNITED STATES STEEL CORP., DEFENDANT-INTERVENORS

Court No. 01-00055

[Plaintiff's Rule 56.2 motion for judgment upon the agency record is denied.]

(Dated June 4, 2002)

*Edmund Maciorowski, PC.* (Edmund Maciorowski, Pamela L. St. Peter), Bloomfield Hills, Michigan, for Plaintiffs.

*Robert D. McCallum, Jr.*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Lucius B. Lau*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Glenn R. Butterson*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for Defendant.

*Dewey Ballantine LLP* (Michael H. Stein, Bradford L. Ward, Navin Joneja), Washington, D.C., for Defendant-Intervenors.

### OPINION

CARMAN, Chief Judge: Plaintiffs Reiner Brach GmbH & Co. KG ("Reiner Brach") and Novosteel SA ("Novosteel") move for judgment upon the agency record, challenging the final results of two administrative reviews of cut-to-length carbon steel plates from Germany by the United States Department of Commerce ("Commerce"). See *Certain Cut-to-Length Carbon Steel Plate From Germany: Final Results of Anti-dumping Duty Administrative Reviews*, 66 Fed. Reg. 3545 (Jan. 16,

2001) (*Final Results*); see also *Issues and Decision Memorandum for the Administrative Reviews of Certain Cut-to-Length Carbon Steel Plate from Germany: August 1, 1997 through July 31, 1998, and August 1, 1998 through July 31, 1999* (Jan. 16, 2001), Def. Pub. App. Ex. 2 (*Decision Memo*). In the *Final Results*, Commerce calculated a 36 percent dumping margin based on total adverse facts available. See *Final Results*, 66 Fed. Reg. at 3546; see also *Preliminary Results*, 65 Fed. Reg. at 54,207. Plaintiffs assert Commerce's decision to apply total facts otherwise available with adverse inferences and its application of a 36 percent dumping margin are not supported by substantial evidence and are not otherwise in accordance with law. Defendant United States and Defendant-Intervenors Bethlehem Steel Corporation and United States Steel Corporation ("Defendant-Intervenors") contend the application of total facts otherwise available with adverse inferences is reasonable. Plaintiffs' challenge to Commerce's determination is denied. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. 1581(c) (2000).

#### BACKGROUND

Reiner Brach is a German producer of cut-to-length steel plate. The merchandise at issue was purchased from Reiner Brach by the Swiss company Novosteel. See *Final Results*, 66 Fed. Reg. at 3545-46. On August 11, 1998, Commerce published a notice of opportunity to request administrative review of *Antidumping Duty Orders and Amendments to Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Germany*, 58 Fed. Reg. 44170 (Aug. 19, 1993) for the period August 1, 1997 through July 31, 1998. See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 63 Fed. Reg. 42,821 (Aug. 11, 1998). A similar notice was published on August 11, 1999 as to that order for the period of August 1, 1998 through July 31, 1999. See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 64 Fed. Reg. 43,649 (Aug. 11, 1999). Novosteel requested administrative reviews and a scope inquiry for both periods of review. See *Final Results*, 66 Fed. Reg. at 3545. After Commerce received Novosteel's responses to its questionnaires, Defendant-Intervenors requested termination of the administrative reviews, arguing Reiner Brach, rather than Novosteel, was the appropriate respondent. See *id.* In opposition to termination of the reviews, on February 2, 2000 Reiner Brach submitted a letter to Commerce agreeing to become a respondent for the reviews. See *id.* Commerce found that "Reiner Brach not only was the producer of the subject merchandise, but also had knowledge that the products were destined for the United States, and that, thus, the sale between Reiner Brach and Novosteel was the appropriate link in the sales chain" upon which to focus. *Id.* at 3545-46.

Commerce issued a questionnaire to Reiner Brach on February 15, 2000 directing it to:

Report all sales of the foreign like product, whether or not you consider particular merchandise to be that which is most appropriately compared to your sales of the subject merchandise. The Department will then select the appropriate comparison sales from your sales listing.

U.S. Department of Commerce, Import Administration, Administrative Review Questionnaire (Feb. 15, 2000), at B-1, Pub. Docs. 33 and 34, Def. Pub. App. Ex. 1 at B-1 (Feb. 15 Administrative Questionnaire). Additionally, Section D of the questionnaire asked for cost of production (COP) and constructed value (CV) information. It stated, "The COP and CV figures that you report in response to this section of the questionnaire should be calculated based on the actual costs incurred by your company during the period of review ("POR"), as recorded under its normal accounting system." *Id.* at D-1.

After Reiner Brach submitted its responses, Commerce sent supplemental questionnaires requesting 1) clarification of discrepancies between the total quantity of home market sales reported in Reiner Brach's responses and the quantity indicated by the sales data in its spreadsheets, and 2) clarification as to why various reported costs were the same for both periods of review. See U.S. Department of Commerce Supplemental Questionnaire (May 25, 2000), at 1, Pub. Doc. 51, Def. Pub. App. Ex. 3 at 3; U.S. Department of Commerce Supplemental Questionnaire (July 11, 2000), at 5-8, Pub. Doc. 68, Def. Pub. App. Ex. 5 at 7-10. As to the first question, Reiner Brach responded that while the total quantity of home market sales were "based on a review of their aggregate sales data," the figures derived from the data spreadsheets were "based on individual invoices for the period of review." Reiner Brach Supplemental Questionnaire Response (June 15, 2000), at 2, Pub. Doc. 60, Def. Pub. App. Ex. 4 at 4. With regard to the second question, Reiner Brach explained the costs "do not markedly change from year to year. The costs given are averages which reflect any slight increase or decrease in costs over the periods of review." Reiner Brach Supplemental Questionnaire Response (July 24, 2000), at 22-29, Pub. Doc. 73, Def. Pub. App. Ex. 6 at 5-12.

Commerce conducted verification of Reiner Brach's responses from August 2 through August 5, 2000. During verification Reiner Brach sought to submit previously unreported home market sales data of identical merchandise, but Commerce refused to accept the information because it constituted substantial new information and therefore was untimely. See Letter from the U.S. Department of Commerce to Edmund Maciorowski, PC (on behalf of Reiner Brach) (Aug. 9, 2000), at 1, Pub. Doc. 92, Def. Pub. App. Ex. 7 at 1. Commerce also discovered during verification that although the cost of production figures submitted for both periods of review were based on the same cost data, Reiner Brach could distinguish costs on a month-by-month basis yet had failed to do so de-

spite the request for "actual" costs. (Def. Br. at 9, citing Verification Report (Aug. 21, 2000) at 11, Conf. Doc. 26.)

Commerce issued its preliminary determination on September 7, 2000. See *Certain Cut-to-Length Carbon Steel Plate From Germany: Preliminary Results of Antidumping Duty Administrative Reviews*, 65 Fed. Reg. 54,205 (Sept. 7, 2000) (*Preliminary Results*). Significantly, Commerce used the total facts otherwise available pursuant to section 776(a)(2)(A) of the Tariff Act of 1930 ("the Act"). See *Preliminary Results*, 65 Fed. Reg. at 54,207. It noted Reiner Brach's provision of information only on a minimal portion of its home market sales of the foreign like product because Reiner Brach had "interpreted [Commerce's] questionnaire to mean that Reiner Brach only had to report identical sales in the home market that matched its U.S. sales." *Id.* Additionally, Commerce indicated that Reiner Brach had failed to provide accurate cost of production information. See *id.* Furthermore, because Reiner Brach had in its records the data that Commerce sought and was capable of providing it but failed to do so, Commerce used adverse inferences when choosing from among the facts otherwise available pursuant to section 776(b) of the Act. See *id.* Commerce decided the "all others rate" of 36 percent was appropriate because it was the highest rate applied to any company in any segment of the proceeding and was calculated during the less-than-fair-value investigation. See *id.* After receiving comments from the parties regarding the preliminary results, Commerce issued its final results on January 16, 2001, which contained no changes in its margin calculations. *Final Results*, 66 Fed. Reg. at 3545.

#### PARTIES' CONTENTIONS

##### *I. Plaintiffs' Contentions*

Plaintiffs contend that Commerce's decision to apply total facts otherwise available with adverse inferences is not supported by substantial evidence on the record and is not otherwise in accordance with law. Plaintiffs present seven arguments to support their contention. First, Plaintiffs argue that in submitting information to Commerce, they complied with the definition of the term "foreign like product" contained in 19 U.S.C. § 1677(16) and their "fair reading" of Commerce's questionnaires. (Pl. Br. at 18.) Based on Plaintiffs' understanding of the statute and questionnaire definitions, Plaintiffs believed they were required to submit home market sales of identical merchandise only. See *id.* at 10, 18.

Second, Plaintiffs posit Commerce did not properly review Reiner Brach's questionnaire responses and any such review would have revealed the alleged omissions. See *id.* at 19-22.

Third, Plaintiffs submit that statutory authority and case law require Commerce to give the respondent involved in the administrative review a reasonable opportunity to provide the information requested and to issue a deficiency letter when a response is not satisfactory. See *id.* at 23. Plaintiffs contend Commerce did not issue deficiency letters to allow for correction of Plaintiffs' responses or submission of omitted informa-

tion. *See id.* Plaintiffs therefore allege Commerce's failure to issue deficiency letters was in error.

Fourth, Plaintiffs challenge Commerce's refusal to accept the information that Reiner Brach submitted during verification regarding home market sales of identical merchandise. *See id.* at 24. Plaintiffs observe that Commerce "routinely" allows parties to submit information during verification and its failure to do so in this case was contrary to law. *See id.* at 25.

Fifth, Plaintiffs contend Commerce improperly refused to extend the date for its final determination and to issue supplemental questionnaires to allow submission of information during verification. *See id.* at 25. Commerce noted in its *Decision Memo* that it did not issue supplemental questionnaires during verification because "such use of the Department's discretion must be reserved for truly unique circumstances, not for cases in which a party's lack of cooperation resulted in a severely deficient record." *Id.* at 27, quoting *Decision Memo*, Def. Pub. App. Ex. 2 at 5. Plaintiffs point to their various submissions of requested information to Commerce to demonstrate their cooperation, and they note that Commerce referred to this case as being "extraordinarily complicated" to show the case is unique. (Pl. Br. at 27-28.)

Sixth, Plaintiffs argue Commerce incorrectly chose to apply total facts otherwise available with adverse inferences. They assert adverse inferences are used only when there is a refusal to provide requested information. Furthermore, Commerce had sufficient information with which to calculate normal value, and therefore total facts otherwise available should not have been used. *See id.* at 29-33.

Finally, the Plaintiffs challenge Commerce's application of the 36 percent dumping margin. They assert that the rate is unreasonable, unreliable, and irrelevant to the totality of the circumstances. *See id.* at 40. It is their claim that the 36 percent margin "bears no rational relationship to the current level of dumping in the industry." *Id.* at 42.

## II. Defendant's Contentions

Defendant and Defendant-Intervenors (collectively "Defendants") assert Commerce was justified in relying upon total facts otherwise available with adverse inferences because Reiner Brach failed to provide home sales data for similar merchandise and improperly reported its cost of production data. Defendants maintain Reiner Brach possessed the requisite information and could have provided it to Commerce. Reiner Brach's failure to do so demonstrates its unwillingness to cooperate to the best of its ability. (Def. Br. at 17-19.)

Second, in response to Plaintiffs' claim that Reiner Brach properly interpreted the questionnaires to require only information regarding identical merchandise, Defendants point out that the questionnaires specifically asked for *all* sales of the foreign like product. *See id.* at 19.

Third, Defendants call attention to the fact that Commerce forwarded supplemental questionnaires to Reiner Brach inquiring about the discrepancies between its questionnaire responses and its sales data for



home market sales as well as the cost of production figures. *See id.* at 21-22. Defendants argue Commerce was not able to determine that the information submitted by Reiner Brach was inaccurate until verification. *See id.* Once Commerce determined during verification that Reiner Brach's submissions were not accurate, Defendants claim Commerce properly used its discretion in deciding not to issue further supplemental questionnaires because there would not be sufficient time to verify the information. *See id.* at 22-23, 26-28. Defendants maintain it is the obligation of the plaintiffs, not Commerce, to ensure the accuracy of the record. *See id.* at 31, quoting *Decision Memo*, Def. Pub. App. Ex. 2 at 4-5.

Fourth, Defendants rebut Plaintiffs' assertion that Commerce has developed a routine practice of accepting information during verification. Defendants distinguish the cases cited by Plaintiffs and call attention to Commerce's warning to Reiner Brach that verification is not an opportunity to submit new factual information. *See id.* at 23-25.

In response to Plaintiffs' complaint regarding Commerce's failure to extend the date for the final determination, Defendants assert Commerce would not have had time to issue a supplemental questionnaire and verify the submitted information. *See id.* at 27, quoting *Decision Memo*, Def. Pub. App. Ex. 2 at 5. Additionally, Defendants point out that extension of the time to issue a final determination is reserved for unique circumstances rather than for cases where there is a lack of cooperation. *See id.*

Sixth, Defendants state Plaintiffs' submission of "voluminous" data is irrelevant because Commerce could not use the sales or cost data to calculate dumping margins. *See id.* at 28. Defendants note that Reiner Brach only submitted a "minimal portion of its home market sales of the foreign like product," (*id.* at 29, quoting *Decision Memo*, Def. Pub. App. Ex. 2 at 6-7), and maintain that "it is the quality of the information submitted, not the quantity that matters." (Def. Br. at 30.)

Finally, Defendants reason that Commerce properly applied the 36 percent dumping margin because the rate "ensures that the respondent does not obtain a more favorable result because it failed to cooperate in these administrative reviews." *Id.* at 33, quoting *Decision Memo*, Def. Pub. App. Ex. 2 at 8. The rate applied in this case was the "all others" rate that Commerce asserts was appropriate to use rather than the lower rates calculated for another German producer of the subject merchandise in recent years because the other German producer had cooperated with Commerce's requests for information. (Def. Br. at 35-36.) Thus Commerce argues the 36 percent rate is reliable, reasonable, and relevant as required by case law. *See id.* at 34-36.

#### STANDARD OF REVIEW

This Court will sustain a final determination of Commerce unless it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera*

*Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotations omitted). Commerce's decision will be upheld "if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Novosteel SA v. United States*, 128 F. Supp. 2d 720, 725 (Ct. Int'l Trade 2001) (internal quote omitted). Commerce's decision is in accordance with law when "the agency's actions were reasonable under the terms of the relevant statute." *Shakesproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 102 F. Supp. 2d 486, 489 (Ct. Int'l Trade 2000). In addition, "[s]ubstantial deference is granted to the agency in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law." *North Star Steel Ohio, a Div. of N. Star Steel Co. v. United States*, 824 F. Supp. 1074, 1077 (Ct. Int'l Trade 1993) (internal quotations omitted).

#### ANALYSIS

##### *I. The Department of Commerce's application of total facts otherwise available is supported by substantial evidence on the record and is otherwise in accordance with law.*

Congress has given Commerce statutory authority to use facts otherwise available in reaching administrative decisions if:

- (1) necessary information is not available on the record, or
- (2) an interested party or any other person—
  - (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
  - (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, \* \* \*
  - (C) significantly impedes a proceeding under this subtitle, or
  - (D) provides such information but the information cannot be verified. \* \* \*

19 U.S.C. § 1677e(a) (2000).

Commerce's ability to use facts otherwise available pursuant to 19 U.S.C. § 1677e(a)(2)(B) is subject to its compliance with § 1677m(c)(1), (d) and (e). Commerce is required to corroborate any secondary information it will rely upon rather than relying upon information obtained during the review. See § 1677e(c). As summarized in *Mannesmannrohren-Werke AG v. United States*, 77 F. Supp. 2d 1302, 1313 (Ct. Int'l Trade 1999), "before Commerce may use facts available, 19 U.S.C. § 1677m(d) \* \* \* requires that Commerce give a party an opportunity to remedy or explain deficiencies in its submission. If the remedy or explanation provided by the party is found to be 'not satisfactory' or untimely, the information may be disregarded in favor of facts available, subject to the five part test in Subsection (e)." In the present case, Commerce applied facts otherwise available based on its determination that Reiner Brach withheld sales information requested and failed to provide cost information in the requested form. See *Decision Memo*, Def. Pub. App. Ex. 2 at 6.

Based on the reasons that follow, the Court sustains Commerce's decision.

*A. Submission of home market sales data*

The Court finds Commerce sufficiently notified Reiner Brach that it was to submit home market sales data for both identical and similar merchandise. Commerce's use of facts otherwise available is justified because Reiner Brach failed to provide information regarding sales of similar merchandise and omitted certain sales of identical merchandise.

Commerce indicated to Reiner Brach in its initial questionnaire dated February 15, 2000 that *all* sales of the foreign like product were to be reported. See Feb. 15 Administrative Questionnaire, at B-1, Pub. Docs. 33 and 34, Def. Pub. App. Ex. 1 at B-1. In Appendix I of the February 15, 2000 questionnaire, Commerce defined "foreign like product" as "merchandise that is sold in the foreign market and that is identical or similar to the subject merchandise." *Id.* at I-7, Def. Pub. App. Ex. 1 at I-7. In light of Commerce's request for "all" home market sales data for "identical or similar merchandise," it is apparent Commerce had requested data for sales of all merchandise that fell under either the "identical" category or the "similar" category, not just one category. With regard to the term "identical merchandise," Commerce provided, "Identical merchandise is the *preferred* category of foreign like product for purposes of the comparison with subject merchandise. The identical merchandise is merchandise that is produced by the same manufacturer in the same country as the subject merchandise, and *which the Department determines* is identical or virtually identical in all physical characteristics with the subject merchandise, as imported into the United States." *Id.* at I-8, Def. Pub. App. Ex. 1 at I-8 (emphasis added). In addition, Commerce made clear it would decide, based upon the information submitted, whether there were any sales of identical foreign like product and what constituted "similar merchandise." As to "similar merchandise," Commerce explained: "In deciding which sales of the foreign like product to compare to sales of the subject merchandise, the Department first seeks to compare sales of identical merchandise. If there are no sales of the identical foreign like product, the Department will compare sales of the foreign like product similar to the subject merchandise." *Id.* at I-11, Def. Pub. App. Ex. 1 at I-11.

In its initial response, Reiner Brach provided only information regarding what *it* considered to be identical merchandise sold in the home market. Reiner Brach relies upon its interpretation of the questionnaire language and the statute defining "foreign like product" to maintain that it reasonably believed it was obligated to report only information

regarding sales of identical merchandise.<sup>1</sup> Despite Plaintiffs' argument, it is clear that Reiner Brach was obligated to provide information regarding both identical merchandise and similar merchandise from Commerce's 1) request for "all" sales of the foreign like product, 2) definition of foreign like product as "identical or similar merchandise," and 3) indication that Commerce will determine itself which sales are appropriate for comparison purposes from those reported, as seen in the definition of identical merchandise as that merchandise *which Commerce determines* is identical. Commerce did not give Reiner Brach discretion to determine which were the proper sales for comparison purposes. Thus Reiner Brach had the obligation to submit information regarding home market sales of both identical merchandise and similar merchandise. See *Allegheny Ludlum Corp. v. United States*, Consol. Ct. No. 99-06-00369, 2000 Ct. Int'l Trade LEXIS 176, at \*49 (Ct. Int'l Trade Dec. 28, 2000) ("In response to this inquiry into home market sales, a defined term that is one of the central issues in any dumping investigation, [the respondent] had a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by Commerce.").

Reiner Brach further argues that Commerce failed to inform it that its response to the initial questionnaire was deficient as required by statute. The facts available statute states Commerce's use of facts otherwise available is subject to 19 U.S.C. § 1677m(d), which reads, "[i]f the administering authority \* \* \* determines that a response to a request for information under this subtitle does not comply with the request, the administering authority \* \* \* shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle."

The Court finds Commerce complied with the requirements of § 1677m(d). First, in the present case, the initial questionnaire was clear as to the information requested. Commerce asked for "all" home market sales of the foreign like product and made clear that "foreign like product" consisted of "identical or similar merchandise." Second, Commerce raised the discrepancies it noticed in the supplemental questionnaire and gave Reiner Brach an opportunity to explain the

<sup>1</sup> "Foreign like product" is defined in 19 U.S.C. § 1677(16) as:

merchandise in the first of the following categories in respect of which a determination for purposes of part II of this subtitle can be satisfactorily made:

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the subject merchandise,  
(ii) like that merchandise in component material or materials and in the purposes for which used, and  
(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,  
(ii) like that merchandise in the purposes for which used, and  
(iii) which the administrative authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16).

discrepancies. In its May 25, 2000 supplemental questionnaire, Commerce stated, "According to your Section A response, total quantity for Home Market sales sold is [\*\*\*] kilograms and the total value is \$[\*\*\*]. However, your sales data indicates that total quantity for Home Market sales is [\*\*\*] MT or ([\*\*\*] kg) and total sales value is \$[\*\*\*]. Please explain these discrepancies." (Def. Pub. App. Ex. 3 at 3). Third, the response given by Reiner Brach to the supplemental questionnaire was so vague that Commerce did not have notice or reason to believe a deficiency existed. Commerce could not have known that there was a deficiency remaining in that Reiner Brach had not submitted all of its home market sales data as requested by Commerce. See *Tung Mung Dev. Co., Ltd.*, 2001 Ct. Intl. Trade LEXIS 94, at \*97. Reiner Brach provided the following answer to the supplemental questionnaire on June 15, 2000, "The quantity and value figures given in Reiner Brach's Section A response were based on a review of their aggregate sales data. The quantity and value figures derived from the data spreadsheets are based on individual invoices for the period of review." (Def. App. Ex. 4 at 4).

Commerce maintains, based on the responses provided by Reiner Brach in the questionnaire and supplemental questionnaire, it could not have determined that the information provided was erroneous until verification. (Def. Br. at 21, citing *Decision Memo*, Def. Pub. App. Ex. 2 at 4). Reiner Brach, on the other hand, asserts the missing information was evident and if Commerce sought both identical and similar merchandise data, it had the obligation to inform Reiner Brach of any deficiency. Reiner Brach cites *Bowe-Passat v. United States*, 17 CIT 335 (1993) and *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 23 CIT 804 (1999) to support its argument, yet both cases are distinguishable. In *Ta Chen*, the information allegedly missing was never specifically requested in the original questionnaire or in the supplemental questionnaires. See *Ta Chen*, 23 CIT at 818-19. The reasoning of the court in *Ta Chen* is grounded in the fact that Commerce did not ask for the specific information in the initial questionnaire and then failed to ask for it in the supplemental questionnaires, thereby clearly violating 19 U.S.C. § 1677m. See *id.* at 818-20. In the present case, however, Commerce requested the specific information it sought in the initial and supplemental questionnaires. See *Tung Mung Dev. Co., Ltd. v. United States*, Consol. Ct. No. 99-07-00457, 2001 Ct. Intl. Trade LEXIS 94, at \*95-96 (Ct. Int'l Trade July 3, 2001) (distinguishing *Ta Chen* based on the fact that in *Ta Chen* Commerce had not specifically asked for the information it later claimed was missing).

In *Bowe-Passat*, the court stated, "In the case at bar, the ITA would have this Court endorse an investigation where the ITA sent out a general questionnaire and a brief deficiency letter, then effectively retreated into its bureaucratic shell, poised to penalize Bowe for deficiencies not specified in the letter that the ITA would only disclose after it was too late, i.e., after the preliminary determination. This predatory 'gotcha' policy does not promote cooperation or accuracy or rea-

sonable disclosure by cooperating parties intended to result in realistic dumping determinations." *Id.* at 343. First, *Bowe-Passat* was decided prior to the enactment of the Uruguay Round Agreements Act in 1994 which governs the present case. Second, it is apparent in *Bowe-Passat* that Commerce was aware of the deficiency at the time it issued the deficiency letter but failed to adequately address the deficiency and to inform Bowe that further information was required. In the present case, however, Commerce states that it was unaware of the deficiency and, based on Reiner Brach's supplemental questionnaire response, could not have known of it until verification. As discussed, the initial questionnaire was clear as to the information requested. In the supplemental questionnaire, Commerce asked about the discrepancies it did notice and gave Reiner Brach an opportunity to explain the discrepancies. Third, in *Bowe-Passat*, the court found that Bowe submitted information in response to the deficiency letter in a timely manner and was prepared to submit the information Commerce later claimed was missing if Commerce had informed Bowe of the deficiency. In the present case, the response given by Reiner Brach to the supplemental questionnaire was so vague that Commerce did not have notice or reason to believe a deficiency existed. It is the interested party's obligation to create an accurate record and provide Commerce with the information requested to ensure an accurate dumping margin. See *Sanyo Elec. Co., Ltd. v. United States*, 9 F. Supp. 2d 688, 697 (Ct. Int'l Trade 1998); *RHP Bearings v. United States*, 875 F. Supp. 854, 857 (Ct. Int'l Trade 1995).

The Court finds Reiner Brach's failure to provide all information regarding home market sales of identical merchandise justifies Commerce's decision to apply facts otherwise available. See 19 U.S.C. § 1677e(a)(2)(A) and (B); see also *Fabrique de Fer de Charleroi S.A. v. United States*, 155 F. Supp. 2d 801, 807-08 (Ct. Int'l Trade 2001). During verification, in letters dated August 2, 7, and 8, 2000, Reiner Brach sought to submit information regarding home market sales of identical merchandise which it had previously "inadvertently omitted." See Letter from Edmund Maciorowski, PC (on behalf of Reiner Brach) to the U.S. Department of Commerce (Aug. 2, 2000), at 1, Pl. Pub. App. 6 Ex. 19 at 1; Letter from Edmund Maciorowski, PC (on behalf of Reiner Brach) to the U.S. Department of Commerce (Aug. 8, 2000), Pl. Pub. App. 6 Ex. 21; Letter from the U.S. Department of Commerce to Edmund Maciorowski, PC (on behalf of Reiner Brach) (Aug. 9, 2000), at 1, Pub. Doc. 92, Def. Pub. App. Ex. 7 at 1. Commerce rejected the submission as "new factual information" and therefore "untimely" submitted. Letter from the U.S. Department of Commerce to Edmund Maciorowski, PC (on behalf of Reiner Brach) (Aug. 9, 2000), at 1, Pub. Doc. 92, Def. Pub. App. Ex. 7 at 1. Plaintiffs claim Commerce has routinely allowed for submission of information during verification and its refusal to do so in these circumstances was contrary to law. (Pl. Br. at 25.) The Court holds Commerce's decision to reject the information in question is supported by substantial evidence and is otherwise in accordance with law.



According to Commerce's regulations, for the final results of an administrative review, a submission of factual information is due no later than 140 days after the last day of the anniversary month. See 19 C.F.R. § 351.301(b)(2)(1999). The anniversary month is "the calendar month in which the anniversary of the date of publication of an order \* \* \* occurs." § 351.102 (b). This court has previously held that Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits, and it has found Commerce's policy of setting time limits to be reasonable because Commerce "clearly cannot complete its work unless it is able at some point to 'freeze' the record and make calculations and findings based on that fixed and certain body of information." *Coalition for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States*, 44 F. Supp. 2d 229, 237, 239 (Ct. Int'l Trade 1999) (citations omitted). Commerce had informed Reiner Brach it would not accept "substantial revisions" during verification; it would accept new information only when "(1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record." Letter from the U.S. Department of Commerce to Edmund Maciorowski, PC (on behalf of Reiner Brach) (July 18, 2000), at 2, Pub. Doc. 82, Def. Intervenor Pub. App. Ex. 25 at 2; Letter from the U.S. Department of Commerce to Edmund Maciorowski, PC (on behalf of Reiner Brach) (July 18, 2000), at 2, Pub. Doc. 83, Def. Intervenor Pub. App. Ex. 26 at 2. This instruction is consistent with Commerce's practice of accepting information during verification where the information relates to minor adjustments to or corroboration or clarification of information already on the record. See, e.g., *Acciai Speciali Terni S.P.A. v. United States*, 142 F. Supp. 2d 969, 1007 (Ct. Int'l Trade 2001); *Coalition for Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs.*, 44 F. Supp. 2d at 235-36. This Court has also upheld Commerce's discretion to reject substantial new factual information submitted after the deadline for submission of such information. See, e.g., *Bergerac, N.C. v. United States*, 102 F. Supp. 2d 497, 503-04 (Ct. Int'l Trade 2000). Commerce determined that even if it were to grant Reiner Brach's request to extend the deadline for the final determination by 60 days and issue supplemental questionnaires to allow submission of the omitted information, "[t]he additional sixty days would not provide sufficient time to review and analyze the data." *Decision Memo*, Def. Pub. App. Ex. 2 at 5.

This Court finds Commerce's rejection of the information submitted during verification to be reasonable in view of: 1) Commerce's discretion in administering and enforcing the applicable statutes and regulations, 2) the clarity of its questionnaires, 3) its inability to discern the omission of information until verification, and 4) its warning that new information would generally not be accepted during verification. Additionally, Commerce's decision to apply fact otherwise available due to Reiner

Brach's failure to provide the requested information was appropriate under the circumstances.

*C. Submission of cost of production information*

This Court finds Commerce acted reasonably in applying facts otherwise available due to Reiner Brach's failure to provide the cost of production information in the manner and form requested. As noted earlier, Reiner Brach was asked to submit cost of production information calculated based on the actual costs it incurred during each period of review. Commerce issued a supplemental questionnaire dated July 11, 2000 in which it asked Reiner Brach why various costs were the same for both periods of review. See U.S. Department of Commerce Supplemental Questionnaire (July 11, 2000), at 5-8, Pub. Doc. 68, Def. Pub. App. Ex. 5 at 7-10. The answer given to each of Commerce's questions was that the various costs figures "do not markedly change from year to year. The costs given are averages which reflect any slight increase or decrease in costs over the periods of review." Reiner Brach Supplemental Questionnaire Response (July 24, 2000), at 22-29, Pub. Doc. 73, Def. Pub. App. Ex. 6 at 5-12. Commerce found Reiner Brach had not submitted the cost of production information in the form and manner requested, making it appropriate for Commerce to apply facts otherwise available pursuant to 19 U.S.C. § 1677e(a)(2)(B).<sup>2</sup> In the *Decision Memo*, Commerce noted Reiner Brach company officials' statements that the company had the ability to provide its costs for each period of review. Additionally, at verification a company official stated that Reiner Brach's reported input materials costs changed between the periods of review and "Reiner Brach could distinguish costs on a month-by-month basis." *Decision Memo*, Def. Pub. App. Ex. 2 at 4, quoting Verification Report (Aug. 21, 2000) at 11, Conf. Doc. 26.

As noted earlier, Commerce's ability to use facts otherwise available pursuant to 19 U.S.C. § 1677e(a)(2)(B) is subject to its compliance with § 1677m(c)(1), (d) and (e). Plaintiffs argue Commerce failed to provide a deficiency letter to Reiner Brach in accordance with § 1677m(d) to notify Reiner Brach of deficiencies in its cost of production information. Commerce issued a supplemental questionnaire specifically requesting information as to why the cost of production figures were reported as averages. Defendants assert Commerce could not determine the information submitted was inaccurate and incomplete until verification. According to Defendants, Commerce believed it did have the proper information in light of Reiner Brach's response to the supplemental questionnaire that there were not marked changes in costs during the periods of review; it was not until verification, when company officials indicated varying costs and Reiner Brach's ability to report them, that

<sup>2</sup>In the *Decision Memo*, Commerce noted the following explanation given by Reiner Brach during verification as to why it did not provide the cost data for each period of review: "(1) cost data for 1999 were available, but the company did not have the personnel available to gather the data and allocate the costs to each cost center; (2) cost data for 1997 were available, but Reiner Brach did not review its records because the data was not of interest to Reiner Brach; and (3) Reiner Brach did not use July 1999 costs because many of its employees were on vacation and July's costs would not have been representative of a normal production month." *Decision Memo*, Def. Pub. App. Ex. 2 at 4.

Commerce was aware of the deficiency. Thus this Court finds Commerce complied with § 1677m(d).

Commerce's use of facts otherwise available is also subject to § 1677m(e), which provides that Commerce "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by" Commerce if:

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce], and
- (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e). In the present case, the condition set forth in § 1677m(e)(4) has not been met. Reiner Brach had actual cost information that could have been reported on a month-by-month basis but failed to provide such information despite Commerce's clear indication in its initial questionnaire that it sought actual costs and its supplemental questionnaire asking why actual costs were not reported. Such failure demonstrates that Reiner Brach did not act to the best of its ability in providing the requested information. Commerce is required to calculate antidumping duty margins as accurately as possible, making it "essential that a respondent provide Commerce with accurate, credible and verifiable information." *Gourmet Equip. (Taiwan) Corp. v. United States*, No. 99-05-00262, 2000 Ct. Intl. Trade LEXIS 82, at \*6-7 (Ct. Int'l Trade July 6, 2000). In striving to obtain accurate and complete information, Commerce has discretion to determine if it is imposing an unreasonable burden by requiring that the information be submitted in a particular form. See *Fabrique de Fer de Charleroi S.A.*, 155 F. Supp. 2d at 808. This Court finds Commerce was not required to use the cost of production information submitted by Reiner Brach pursuant to § 1677m(e).

*II. The Department of Commerce's decision to use adverse inferences is supported by substantial evidence and was otherwise in accordance with law.*

Once Commerce has determined that it will apply facts otherwise available under 19 U.S.C. § 1677e(a), it may decide to draw adverse inferences in selecting from among the facts otherwise available pursuant to § 1677e(b). See *Branco Peres Citrus, S.A. v. United States*, 173 F. Supp. 2d 1363, 1371 (Ct. Int'l Trade 2001). In order to apply adverse inference though, Commerce must first find "that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" from Commerce. § 1677e(b). In the present case, Commerce determined in the *Final Results* that Reiner Brach did

not cooperate to the best of its ability in reporting home market sales data and cost of production figures. See *Decision Memo*, Def. Pub. App. Ex. 2 at 8.

According to the Statement of Administrative Action ("SAA"), H.R. REP. NO. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4199, "[w]here a party has not cooperated, Commerce and the Commission may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, one factor the agencies will consider is the extent to which the party may benefit from its own lack of cooperation." Commerce's finding that the respondent failed to cooperate "must be reached by 'reasoned decision-making,' including \* \* \* a reasoned explanation supported by a stated connection between the facts found and the choice made." *Steel Auth. of India, Ltd. v. United States*, 149 F. Supp. 2d 921, 929 (Ct. Int'l Trade 2001) (citations omitted); see also *Mannesmannrohren-Werke AG*, 77 F. Supp. 2d at 1313-14 (noting that "Commerce needs to articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of its investigation."). The Court in *Steel Authority of India* made clear that "[Commerce] cannot merely recite the relevant standard or repeat its facts available finding. Rather, in order to satisfy its statutory obligations, [Commerce] must be explicit in its reason for applying adverse inferences." *Steel Auth. of India, Ltd.*, 149 F. Supp. 2d at 930 (internal citations omitted). Further, where the interested party has not submitted accurate and complete information but does have the ability to comply with Commerce's request, Commerce must demonstrate "a willfulness on the part of the respondent or behavior below the standard of a reasonable respondent in order to apply adverse inferences." *Id.* at 930 n.11 (citing *Nippon Steel Corp. v. United States*, 118 F. Supp. 2d 1366, 1378-79 (2000)); see also *Nippon Steel Corp. v. United States*, 146 F. Supp. 2d 835, 840 (Ct. Int'l Trade 2001) (stating that in cases where the omission is due to inadvertence, "the simple fact of a respondent's failure to report information within its control does not warrant an adverse inference." )<sup>3</sup>

In the present case, Commerce properly made the additional finding required to apply adverse inferences. In the *Preliminary Results*, from which the *Final Results* did not differ and to which no changes were made, Commerce outlined Reiner Brach's failure to provide the requested home market sales data and cost of production figures as its basis for using total facts available. See *Preliminary Results*, 65 Fed. Reg. at 54,207; see also *Final Results*, 66 Fed. Reg. at 3546. It then indicated that "Reiner Brach acknowledged that it had the requested data in its records and was capable of providing it to [Commerce], but nevertheless failed to provide a complete response to the Department's question-

<sup>3</sup> In cases where the interested party claims an inability to comply with Commerce's request, Commerce must minimally find that the party had the ability to comply but did not do so. See *Steel Auth. of India, Ltd.* 149 F. Supp. 2d at 930.

naire. Thus, we find that Reiner Brach failed to cooperate by not acting to the best of its ability with respect to its home market sales and cost data." *Preliminary Results*, 65 Fed. Reg. at 54,207. As to the cost of production figures, in the Decision Memo, Commerce explained that a Reiner Brach official stated in verification that the cost of production changed between the two periods of review, and the company could distinguish costs on a month-by-month basis. See *Decision Memo*, Def. Pub. App. Ex. 2 at 4. Commerce determined it did not have the required information "to conduct an accurate salesbelow-cost test for each review which would allow [Commerce] to choose the correct above the cost of production home market sales for comparison with Reiner Brach's U.S. sales." *Id.*

To determine whether a respondent has cooperated to the best of its ability, Commerce may make justifiable inferences based on the record before it. See *Asociacion Colombiana de Exportadores de Flores v. United States*, 40 F. Supp. 2d 466, 472 (Ct. Int'l Trade 1999). This Court has acknowledged that "Commerce must necessarily draw some inferences from a pattern of behavior." *Borden, Inc. v. United States*, No. 96-08-01970, 1998 WL 895890, at \*1 (Ct. Int'l Trade Dec. 16, 1998); see also *Nippon Steel Corp.*, 146 F. Supp. 2d at 840; *Mannesmannrohr-Werke AG*, 120 F. Supp. 2d at 1082-1087; see, e.g., *Mannesmannrohr-Werke AG*, 77 F. Supp. 2d at 1317. The facts of the case at hand demonstrate a pattern of behavior which makes Commerce's decision to use adverse inferences reasonable. Reiner Brach failed to provide information regarding home market sales of similar merchandise despite the clear language of the questionnaire asking for information on "all sales" of the foreign like product in the home market. It based its decision not to submit such information on the assumption that it only had to submit information regarding home market sales of identical merchandise, but it never asked Commerce to clarify whether its assumption was correct even in light of Commerce's supplemental questionnaire raising concerns regarding the submitted information. It then failed to provide all of its information regarding home market sales of the identical merchandise and did not seek to submit the information until verification, at which time Commerce would not have sufficient opportunity to review and verify the information. Further, it failed to provide Commerce with the actual costs of production for each period of review as requested in plain terms by Commerce, despite the fact that the information was available to Reiner Brach and Commerce gave it the opportunity to submit the information in a supplemental questionnaire. In each of the supplemental questionnaires, Reiner Brach supplied vague answers from which Commerce was not able to ascertain the nature or extent of the deficiencies until verification. This cumulative evidence justifies Commerce's finding that Reiner Brach failed to cooperate to the best of its ability, and therefore Commerce's decision to apply adverse inferences is supported by substantial evidence and is otherwise in accordance with law.

*III. The Department of Commerce's decision to apply the 36 percent dumping margin is supported by substantial evidence and is otherwise in accordance with law.*

Plaintiffs argue that even if Commerce properly chose to apply total facts otherwise available with adverse inferences, its choice of a 36 percent dumping margin is not supported by substantial evidence and is not otherwise in accordance with law. Plaintiffs state, "There is nothing in [Commerce's] determination that will support a 36% dumping margin as a reasonably accurate estimate of Respondent's actual rate, even with a built-in increase intended as a deterrent for non-compliance." (Pl. Br. at 41.) Plaintiffs posit the rate is outdated since it was calculated in a less than fair value investigation eight years ago. Additionally, Plaintiffs state the margin is not rationally related to Reiner Brach's activities because the margin had been based on sales by another German corporation, AG der Dillinger Hutterwerke ("Dillinger"), with greater manufacturing capabilities as well as a different product line and different annual sales revenue. Plaintiffs submit that the margin is not relevant because it is not rationally related to the current level of dumping in the industry. (Pl. Br. at 40-43.)

Defendants support Commerce's use of the 36 percent dumping margin by noting that the rate is not outdated, is the current all others rate, and is the rate presently applicable to exports by Plaintiffs as well as being the all others rate. Its use serves as a means of providing an incentive for a respondent to cooperate in administrative reviews, and the Court of Appeals for the Federal Circuit has acknowledged Commerce's discretion, albeit not unbounded, in choosing sources and facts upon which to rely where a respondent has been uncooperative. See *Flii De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). The rate has not been discredited since the less than fair value investigation. Defendants also assert that it was more appropriate to use the 36 percent margin rather than lower rates calculated in subsequent reviews of Dillinger because Dillinger had cooperated with Commerce's requests for information while Reiner Brach had not. Defendants assert Commerce complied with the requirement of 19 U.S.C. § 1677e(c) that "[w]hen [Commerce] \* \* \* relies on secondary information rather than on information obtained in the course of an investigation or review, [Commerce] \* \* \* shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal." The rate came from a less than fair value investigation of Dillinger and "there was no evidence on the record indicating that the business practices of Reiner Brach differ significantly from those of other members of the German steel industry." (Def. Br. at 36.)

As noted, Commerce must corroborate secondary information used in an administrative review. See 19 U.S.C. § 1677e(c). The SAA states "[c]orroborate means that the agencies will satisfy themselves that the secondary information to be used has probative value." SAA, 1994



U.S.C.C.A.N. at 4199. This Court has posited that "[i]n order to comply with the statute and the SAA's statement that corroborated information is probative information, Commerce must assure itself that the margin it applies is relevant, and not outdated, or lacking a rational relationship to [Respondent]." *Ferro Union, Inc. v. United States*, 44 F. Supp. 2d 1310, 1335 (Ct. Int'l Trade 1999). Commerce has broad, but not unrestricted, discretion in determining what would be an accurate and reasonable dumping margin where a respondent has been found to be uncooperative. See *F. Iii De Cecco di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032 ("Particularly in the case of an uncooperative respondent, Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin. Commerce's discretion in these matters, however, is not unbounded."). It cannot impose "punitive, aberrational, or uncorroborated margins." *Id.*

Generally margins have been invalidated where the margin also did not bear a rational relationship to the interested party, had been discredited, or other margins were available. See *Kompass Food Trading Int'l, etal. v. United States*, No. 98-09-02848, 2000 Ct. Intl. Trade LEXIS 92, at \*16 n.6 (Ct. Int'l Trade July 31, 2000); see also *F. Iii De Cecco di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032-34; *Am. Silicon Techs. v. United States*, 110 F. Supp. 2d 992, 1003-04 (Ct. Int'l Trade 2000). In *Kompass Food Trading International*, this Court stated that the fact that a margin was three years old, where it was otherwise rational and relevant, was an insufficient basis to invalidate the margin. See *Kompass Food Trading Int'l*, 2000 Ct. Intl. Trade LEXIS 92, at \*16 n.6. Even in a case where an eight year old margin was invalidated, the reason for the invalidation was because the margin bore no rational relationship to the respondent and not because it was outdated. See *id.* The rate applied by Commerce in this case is the "all others" rate that currently applies to Plaintiffs and has not been discredited to date. Commerce was not required to select the rate determined for Dillinger in recent years because Dillinger, unlike Reiner Brach, has cooperated by properly responding to Commerce's requests for information. "Here, it is clear, moreover, that the statute has no requirement that Commerce is limited to the highest rate imposed on a cooperating company when selecting a rate for a noncooperating respondent." *F. Iii De Cecco di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032. The margin selected serves to induce cooperation by respondents in administrative reviews without being "punitive, aberrational or uncorroborated." Therefore this Court holds that the use of the 36 percent dumping margin is supported by substantial evidence and is otherwise in accordance with law.

## CONCLUSION

This Court finds that Commerce's use of total facts otherwise available with adverse inferences and its use of the 36 percent dumping margin are supported by substantial evidence and is otherwise in accordance with law. Therefore the *Final Results* is affirmed in its entirety.

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(Slip Op. 02-51)

ACCIALI SPECIALI TERNI S.P.A., ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT, AND ALLEGHENY LUDLUM CORP., ET AL., DEFENDANT-INTERVENORS

Court No. 01-00051

[In response to Plaintiffs' motion for judgment upon the agency record under Rule 56.2, and in consideration of Defendant's and Defendant-Intervenors' memoranda in opposition thereof, Plaintiffs' motion is denied. The Department of Commerce's determination in *Grain-Oriented Electrical Steel From Italy; Final Results of Countervailing Duty Administrative Review*, 66 Fed. Reg. 2,885 (Dep't Comm.) (January 12, 2001) is remanded.]

(Dated June 4, 2002)

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Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Lucius B. Lau, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Brent M. McBurney, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; Michele D. Lynch, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for Defendant.

Collier Shannon Scott, PLLC (Eric R. McClafferty, Michael J. Coursey, Kathleen W. Cannon, David A. Hartquist) for Defendant-Intervenors.

Dewey Ballantine L.L.P. (John A. Ragosta, John R. Magnus, Hui Yu) for Amici Curiae.

## OPINION

CARMAN, *Chief Judge*: Plaintiffs contest certain aspects of the United States Department of Commerce's (the Department, or Commerce) determination in *Grain-Oriented Electrical Steel From Italy; Final Results of Countervailing Duty Administrative Review*, 66 Fed. Reg. 2,885 (Jan. 12, 2001) (*Final Results*). The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c).

The principal dispute revolves around whether the manufacturer/exporter of the subject merchandise continued to receive countervailable subsidies after it was privatized by the Government of Italy.

## BACKGROUND

*I. Corporate History of AST*

The complex corporate history of AST begins with Istituto per la Ricostruzione Industriale (IRI), a holding company of the Government of

Italy. IRI wholly owned Finsider S.p.A. (Finsider), another holding company that controlled all state-owned steel companies in Italy. Finsider's main operating subsidiary was Terni Societa' per l'Industria e l'Elettricit  S.p.A. (Terni). In 1987, as part of a restructuring, Terni transferred its assets, including those for electrical steel production, to a new company called Terni Acciai Speciali S.p.A. (TAS). *Issues and Decision Memorandum: Final Results of Countervailing Duty Administrative Review: Grain-Oriented Electrical Steel from Italy* from Holly A. Kuga to Troy H. Cribb (*Decision Memorandum*) at 2, Pl. Pub. App. Ex. 2 at 2.<sup>1</sup> In 1988, as part of another restructuring, Finsider and its main operating companies, including TAS, entered into liquidation and ILVA, S.p.A. (ILVA) was formed. On January 1, 1989, the day ILVA became operational, part of TAS's liabilities and most of its assets were transferred to ILVA. See *Final Affirmative Countervailing Duty Determination: Grain-Oriented Electrical Steel From Italy*, 59 Fed. Reg. 18,357, 18,358 (Apr. 18, 1994) (*Electrical Steel*). These included all assets associated with the production of electrical steel. On April 1, 1990, TAS's remaining assets and liabilities were transferred to ILVA. Only certain non-operating assets remained with TAS. *Id.*

From 1989 through 1993, ILVA consisted of several operating divisions, including the Specialty Steels Division located in Terni. ILVA was also majority owner of many separately incorporated subsidiaries, together with which it constituted the ILVA Group. IRI continued to own the ILVA Group. *Id.* In September 1993, IRI endorsed a plan to reorganize and privatize the ILVA Group by forming two new companies. Accordingly, on December 31, 1993, the Specialty Steels Division in Terni was separately incorporated by a demerger into Acciai Speciali Terni S.r.l. (AST S.r.l.) (producer of specialty steel) and ILVA Laminati Piani S.r.l. (ILP) (producer of carbon steel flat products). The remainder of ILVA Group's assets, its existing liabilities, and much of the redundant workforce were transferred to ILVA Residua. *Decision Memorandum* at 2.

Initially, IRI owned all shares of AST S.r.l. Around the same time that IRI established AST S.r.l. as a separate corporation, IRI made a public offering for its sale. To prepare for this sale, IRI converted AST S.r.l. from a limited liability company (S.r.l.) to a stock company (S.p.A.) on February 11, 1994. *Id.*

KAI, a privately-held holding company jointly owned by German steelmaker Krupp AG Hoesch-Krupp and a consortium of private Italian companies called FAR Acciai S.r.l., agreed to purchase AST S.p.A. It signed a purchase agreement with IRI on July 14, 1994. *Id.* The European Commission approved the purchase agreement on December 21,

<sup>1</sup> The *Issues and Decision Memorandum: Final Results of Countervailing Duty Administrative Review: Grain-Oriented Electrical Steel from Italy* from Holly A. Kuga to Troy H. Cribb (*Decision Memorandum*) is included as part of *Grain-Oriented Electrical Steel From Italy; Final Results of Countervailing Duty Administrative Review*, 66 Fed. Reg. 2,886 (Jan. 12, 2001) (*Final Results*). All page numbers for the *Decision Memorandum* are cited as paginated in Plaintiff's Public Appendix Exhibit 2.

1994, and the shares formally changed hands effective December 23, 1994. *Id.*

Between 1995 and 1998, AST S.p.A. and its parent companies underwent several restructurings and changes in ownership. At the end of the period of review, Krupp Thyssen Stainless GmbH (part of the Krupp AG Hoesch-Krupp group) owned 90 percent of AST, and Fintad Securities S.A., a private Italian company, owned 10 percent of AST S.p.A. *Id.*

Throughout much of this opinion, the Court will refer to AST in all its forms as AST. For convenience, however, this Court will occasionally refer to AST either as Pre-Sale AST, referring to AST in its pre-privatized forms, or as Post-Sale AST, referring to AST in its privatized state.

## II. Procedural History

On July 7, 2000, the Department published the preliminary results of its administrative review of the countervailing duty order on grain-oriented electrical steel for the period of review January 1, 1998 through December 31, 1998, covering the manufacturer/exporter AST. See *Grain-Oriented Electrical Steel From Italy; Preliminary Results of Countervailing Duty Administrative Review and Extension of Time Limit for Final Results of Countervailing Duty Administrative Review*, 65 Fed. Reg. 41,950 (July 7, 2000) (*Preliminary Results*). In the *Preliminary Results*, the Department invited interested parties to comment upon the impact that *Delverde, SRL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000) (*Delverde III*), issued by the United States Court of Appeals for the Federal Circuit on February 2, 2000, could have upon the Department's privatization methodology. *Preliminary Results*, 65 Fed. Reg. at 41,951. The Department received comments from petitioners and AST in their case and rebuttal briefs. The Department also sent questionnaires soliciting further information from AST, the Government of Italy, and the European Commission on September 28, 2000 and October 27, 2000. *Final Results*, 66 Fed. Reg. at 2,885.

Concurrent to the above proceedings, AST challenged in this Court a separate final determination by Commerce, *Final Affirmative Countervailing Duty Determination; Stainless Steel Plate in Coils From Italy*, 64 Fed. Reg. 15,508 (Mar. 31, 1999) (*Stainless Steel Plate in Coils*). See *Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States and Allegheny Ludlum Corp.*, et al., No. 99-06-00364, 2002 WL 342659 (CIT Feb. 1, 2002). On August 14, 2000, the Honorable Evan J. Wallach remanded *Stainless Steel Plate in Coils* to the Department to issue a determination consistent with *Delverde III*. On November 21, 2000, the Department issued its interpretation of *Delverde III* and its revised change in ownership methodology in *Draft Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. v. United States* (*Draft Redetermination*).

The next day, the Department placed the public version of the *Draft Redetermination* on the record of the administrative review being challenged in this action and gave the parties an opportunity to comment upon the change in ownership approach. In addition to submitting com-

ments on December 6, 2000, petitioners and AST participated in a public hearing held by the Department on December 15, 2000. *Final Results*, 66 Fed. Reg. at 2,885.

On December 19, 2000, the Department issued the *Final Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. v. United States (Final Redetermination)*. See *Acciai Speciali Terni S.p.A. v. United States and Allegheny Ludlum Corp., et al.*, 2002 WL 342659 at \*3. Afterwards, it placed the *Final Redetermination* on the record of the administrative review being challenged in this action.

On January 12, 2001, the Department issued the *Final Results* that Plaintiffs are challenging in this action, calculating a net subsidy rate of 14.25 percent for the period of review. 66 Fed. Reg. at 2,886.

### III. Delverde III

As stated above, the United States Court of Appeals for the Federal Circuit issued *Delverde III* on February 2, 2000. Its central role in both the Department's proceedings below and the parties' contentions before this Court necessitates a brief summary of the decision.

In *Delverde III*, Commerce conducted a countervailing duty investigation of the company Delverde for the period of review 1994. In the course of the investigation, Commerce learned that Delverde had paid fair market value (FMV) for corporate assets from a private company that had received nonrecurring countervailable subsidies from the Government of Italy from 1983-1991. See *Delverde III*, 202 F.3d at 1362. Commerce determined the concerned assets had a 12-year average useful life. It divided the subsidy by the average useful life to reach an allocation of the subsidy for each of the twelve years. Because Commerce assumed a portion of the subsidies passed through to Delverde when Delverde purchased the concerned assets, Commerce, after making adjustments based on the purchase price, allocated a subsidy amount to Delverde for its 1994 period of review. Delverde argued before this Court that Commerce's assumption that a pro rata portion of the former owner's nonrecurring subsidies "passed through" to Delverde was erroneous and not in accordance with the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act. *Id.* at 1362-1363. After remanding to Commerce to consider the terms of the sale to determine whether Delverde had indirectly received the former owner's subsidies, this Court affirmed Commerce's determination. *Delverde, SrL v. United States*, 24 F. Supp. 2d 314, 317 (Ct. Int'l Trade 1998). Delverde timely appealed to the Federal Circuit.

The Federal Circuit found that in order to conclude a person received a subsidy, 19 U.S.C. § 1677(5)(B) clearly requires Commerce to "determine that a government provided that person with both a *financial contribution* \* \* \* and a *benefit*." *Delverde III*, 202 F.3d at 1365 (emphasis in original). The Court next turned to the statute's change of ownership provision, which states:

A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a

determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

19 U.S.C. § 1677(5)(F). The Court therefore found that although the statute prohibits the automatic conclusion that a subsidy has "been extinguished solely by an arm's length change of ownership," it also prohibits a *per se* rule that "a change in ownership *always* requires a determination that a past countervailable subsidy continues to be countervailable." *Delverde III*, 202 F.3d. at 1366 (emphasis in original). The Court concluded: "[T]he statute does not contemplate any exception to the requirement that Commerce determine that a government provided both a financial contribution and benefit to a person \* \* \* before charging it with receipt of a subsidy \* \* \*." *Id.* The Federal Circuit held that Commerce's methodology was inconsistent with 19 U.S.C. § 1677(5) and therefore invalid because Commerce did not determine whether *Delverde* received a financial contribution and benefit.

#### *IV. Final Determination By the Department of Commerce*

In its *Final Results*, Commerce stated the Federal Circuit in *Delverde III* had "rejected the same change in ownership methodology that [was] applied in the Preliminary Results in the instant review." *Decision Memorandum* at 3. Specifically, Commerce noted *Delverde III*'s holding that "the Tariff Act, as amended, does not allow Commerce to presume conclusively that the subsidies granted to the former owner of *Delverde*'s corporate assets automatically 'passed through' to *Delverde* following the sale. Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether *Delverde* directly or indirectly received both a financial contribution and benefit from the government." *Id.*, quoting *Delverde III*, 202 F.3d at 1364. Accordingly, Commerce applied a new two-step change in ownership approach to determine whether AST directly or indirectly received both a financial contribution and benefit from the Government of Italy. *Decision Memorandum* at 3. In its first step, Commerce examined whether AST "[was] the same person as the one that received the subsidies." *Id.* To make this determination, Commerce analyzed four factors: (1) continuity of general business operations; (2) continuity of production facilities; (3) continuity of assets and liabilities; and (4) retention of personnel. *Id.* The Department stated it would "generally consider the post-sale entity to be the same person as the pre-sale entity if, based on the totality of the factors considered, [it] determine[d] that the entity sold in the change-in-ownership transaction [could] be considered a continuous business entity because it was operated in substantially the same manner before and after the change in ownership." *Id.* If the pre- and post-sale entities were considered to be the same person, "nothing material [would have] changed since the original bestowal of the subsidy, so that the statutory requirements for finding a subsidy [would be] satisfied with regard to



that person." *Final Redetermination* at 7, Pl. Pub. App. Ex. 3 at 7. This Court will refer to this step in Commerce's analysis as the "Personhood Test."

If the pre- and post-sale entities were two distinct persons, however, Commerce would proceed to the second step of its analysis and consider "whether any subsidy had been bestowed upon that producer/exporter as a result of the change-in-ownership transaction." *Id.*

After analyzing the above four factors, Commerce determined that Post-Sale AST "is for all intents and purposes the same person as that which existed prior to the privatization. Hence, \*\*\* [Post-Sale AST] received the financial contributions and benefits at issue in this review." *Decision Memorandum* at 4.

Commerce applied its Personhood Test to eight subsidy programs under review: (1) equity infusions provided by the Government of Italy, through IRI, to TAS or ILVA between 1987 and 1992 (*Decision Memorandum* at 8); (2) debt forgiveness resulting from the 1988-1990 restructuring plan (*Id.* at 8-9); (3) debt forgiveness resulting from the 1993-1994 restructuring plan (*Id.* at 9-11); (4) government interest contributions on AST's outstanding loans financed by IRI bond issues (*Id.* at 11); (5) pre-privatization retirement benefits to qualified steel workers under Italian Law 451/94 (*Id.* at 11-12); (6) exchange rate guarantees from the Italian Ministry of Treasury for AST's outstanding European Coal and Steel Community loans (*Id.* at 13-14); (7) European Coal and Steel Community loan to AST under Article 54 of the 1951 European Coal and Steel Community Treaty (*Id.* at 14-15); and (8) European Social Fund Objective 4 funding of training for employees in companies undergoing restructuring (*Id.* at 15-16).

#### ANALYSIS

##### STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in a countervailing duty administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law \*\*\*," 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

Commerce's factual determinations are supported by substantial evidence on the record if "such relevant evidence as a reasonable mind might accept as adequate" supports its conclusion. *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Commerce's interpretation of the countervailing duty statute is "in accordance with law" if it comports with Congress's intention on the precise question at issue. See *Timex VI., Inc. v. United States*, 157 F.3d 879, 881-882 (Fed. Cir. 1998). If Congress's intention is not judicially ascertainable, this Court must consider whether Commerce's interpretation of the statute is reasonable in light of the overall statutory scheme. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

## THE STATUTE

To ascertain whether Commerce's determination is in accordance with law, this Court first examines the law as set forth in the statute. For Commerce to assess countervailing duties, Commerce must determine that a "government \*\*\* or any public entity \*\*\* is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States \*\*\*." 19 U.S.C. § 1671(a)(1).

A "countervailable subsidy" is described in 19 U.S.C. § 1677(5)(B) as one in which an authority "provides a financial contribution \*\*\* to a person and a benefit is thereby conferred." The statute defines "financial contribution" as

- (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,
- (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,
- (iii) providing goods or services, other than general infrastructure, or
- (iv) purchasing goods.

19 U.S.C. § 1677(5)(D). The statute also details the meaning of "benefit conferred:"

A benefit shall normally be treated as conferred where there is a benefit to the recipient, including—

- (i) in the case of an equity infusion, if the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made,
- (ii) in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market,
- (iii) in the case of a loan guarantee, if there is a difference, after adjusting for any difference in guarantee fees, between the amount the recipient of the guarantee pays on the guaranteed loan and the amount the recipient would pay for a comparable commercial loan if there were no guarantee by the authority, and
- (iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.

19 U.S.C. § 1677(5)(E).

Finally, a countervailable domestic subsidy must be specific to an enterprise or industry. See 19 U.S.C. § 1677(5)(A), and (5A)(D).

## ISSUES

*I. Commerce's two-step methodology for determining whether Post-Sale AST continues to receive indirect or direct subsidies granted Pre-Sale AST is supported by substantial evidence on the record or otherwise in accordance with law.*

This Court finds Commerce's two-step methodology to be supported by substantial evidence on the record or otherwise in accordance with law for three reasons: First, Commerce's methodology conforms with the statutory requirements for finding a subsidy countervailable; second, Commerce's methodology is consistent with *Delverde III*; third, Commerce's methodology is reasonable and therefore within the discretion entrusted it by Congress to determine whether the privatization of a government-owned firm has eliminated any previously conferred countervailable subsidies.

First, Commerce's two-step methodology is in keeping with the statute's clear requirement that certain elements be satisfied in order for Commerce to impose countervailing duties. As the Federal Circuit found in *Delverde III*, "[T]he statute does not contemplate any exception to the requirement that Commerce determine that a government provided both a financial contribution and benefit to a person, either directly or indirectly \* \* \*, before charging it with receipt of a subsidy \* \* \*." *Delverde III*, 202 F.3d at 1366. Commerce complied with these statutory requirements and found each of the subsidy programs described above to be countervailable.

The issue before this Court is whether Commerce properly determined that the subsidy programs found countervailable with respect to Pre-Sale AST remained countervailable with respect to Post-Sale AST in 1998. The statute provides minimal guidance in this situation, stating only that

[a] change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

19 U.S.C. § 1677(5)(F). The statute does not require that Commerce make a second financial contribution and benefit determination if the entity that originally received the subsidy is the same one being reviewed after privatization. Such a determination would only be redundant. Therefore, Commerce's two-step methodology is in accordance with the statute.

Second, Commerce's two-step methodology is consistent with *Delverde III*. In *Delverde III*, the Federal Circuit held that the statute prohibits a *per se* rule for determining whether a subsidy continues to be countervailable to a new owner following a change in ownership. *Delverde III*, 202 F.3d at 1366, 1368. Instead, the Court stated that the Tariff Act of 1930 requires Commerce to examine the particular facts and

circumstances of the sale in order to determine whether the subsidies granted to the former owner of an entity's corporate assets pass through to the new owner following the sale. *Delverde III*, 202 F.3d at 1364. *Delverde III* stresses the need to determine whether subsidies continue to be countervailable to the new owner.

In response to *Delverde III*, Commerce first determined whether Post-Sale AST was the same person as Pre-Sale AST, the original subsidy recipient. Finding them to be the same, Commerce considered the statutory requirements for finding a subsidy to have been met and therefore continued to impose countervailing duties against AST. Commerce's analysis does not result in an automatic assessment of countervailing duties against a new owner of the shares of AST. In this case, Commerce is assessing duties against AST, not against KAI or any of the subsequent owners of AST's stock. A subsidy recipient is usually distinguishable from an owner of shares of the subsidy recipient's stock.<sup>2</sup>

A sale of 100 percent of a corporation's shares demonstrates this distinction. Commerce has stated that "a simple sale of shares \* \* \* is the type of case that would most readily reveal no change in the legal person." *Final Redetermination* at 9-10, Pl. Pub. App. Ex. 3, at 9-10. This is because a stock purchase changes the identity of the shareholders who own the original subsidy recipient, but it does not affect the identity of the corporate entity itself. Therefore, absent evidence that the subsidy has been extinguished, the subsidy merely continues to reside in the corporation that is now owned by new shareholders. See e.g., *British Steel v. United States*, 879 F. Supp. 1254, 1273 (Ct. Int'l Trade 1995), *aff'd in part, rev'd in part on other grounds by LTV Steel, Inc. v. United States*, 174 F.3d 1359 (Fed. Cir. 1999) (discussing hypothetical in which a subsidy does not travel after a change in shareholders of a corporation but remains with the corporation that continues to exist).

A sale of only several corporate assets presents a different scenario. There it could be argued that the new owner has stepped into the shoes of the subsidy recipient, requiring a new determination of financial contribution and benefit. However, Commerce's four-factor analysis allows it to identify substance over form of the transaction. If the commercial reality is a shared identity between pre- and post-privatization entity, Commerce may presume the subsidy remains with the post-privatization entity absent evidence to the contrary.

Plaintiffs have the responsibility to demonstrate that the benefits from prior subsidies have been extinguished, either through the change of ownership or otherwise. The change of ownership provision at 19 U.S.C. § 1677(5)(F) does not require Commerce to conduct a second benefit determination. Rather, it addresses the sufficiency of the subsi-

<sup>2</sup> The Court distinguishes its analysis from the analyses found in *Allegheny Ludlum Corp. v. United States*, 182 F. Supp. 2d 1357 (Ct. Int'l Trade 2002), *GTS Industries S.A. v. United States*, 182 F. Supp. 2d 1369 (Ct. Int'l Trade 2002), *Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States and Allegheny Ludlum Corp.*, et al., No. 99-06-00364, 2002 WL 342659 (Ct. Int'l Trade Feb. 1, 2002), and *ILVA Lamiere E Tubi S.R.L., et al.*, No. 00-03-00127, 2002 WL 484675 (Ct. Int'l Trade Mar. 25, 2002). In those cases, a key consideration was whether the new owner received the benefit of the financial contribution. In this case, the Court focuses upon whether the original subsidy recipient, being the same person before and after the change of ownership, continues to receive the subsidy benefit.

dy recipient's evidence that a subsidy is no longer countervailable. It states that "[a] change in ownership \* \* \* does not by itself require a determination by the administering authority that a past countervailable subsidy \* \* \* no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction." 19 U.S.C. § 1677(5)(F) (emphasis added). Commerce is not required to conduct a second benefit investigation once it determines that the original subsidy recipient remains the same following a change of ownership.

Plaintiffs point to no record evidence that the benefits from the subsidy programs have been extinguished. Plaintiffs argue that *Delverde III* requires Commerce to make a benefit determination whenever there has been a fundamental change in ownership and that the benefit determination must turn upon whether Fair Market Value (FMV) was paid for the company. Plaintiffs contend that such a determination would reveal that neither AST nor its current owner received benefits because the buyers paid FMV arrived at through arm's length negotiations after an open and competitive bidding process. They assert that the bidding process resulted in a higher purchase price than the seller's independent consultants had originally projected. Nowhere in Plaintiffs' briefs do they point to evidence on the record that the FMV, although higher than originally projected, was in any way affected by AST's countervailing duty liability. The mere payment of more or less for the purchase of shares of stock would seem to have no impact by itself upon the amount of countervailable duty liability any more than such payment would have on the amount of a mortgage liability that was the responsibility of AST. It would simply mean the purchaser of stock paid more or less for its shares. Such payment by itself would not extinguish liabilities to third parties.

Finally, Commerce's two-step methodology is reasonable and therefore within the discretion entrusted it by Congress to determine whether the privatization of a government-owned firm has eliminated any previously conferred countervailable subsidies. The statute, its legislative history, and *Delverde III* do not indicate the method by which Commerce is to make this determination. However, the Statement of Administrative Action states:

The issue of the privatization of a state-owned firm can be extremely complex and multifaceted. While it is the Administration's intent that Commerce retain the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies, Commerce must exercise this discretion carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. REP. NO. 103-826, at 928 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4241. The Court in *Delverde III* also noted that the statute's change of ownership provision "does not direct Commerce to use any

particular methodology for determining the existence of a subsidy in a change of ownership situation." Therefore, this Court accords deference to Commerce's decision to make as its first step a determination of whether the pre- and post-privatization entities share the same identity.

In this case, Commerce acted within its discretion when it looked to principles of corporate successorship for guidance. It is reasonable to consider criteria developed in the corporate context for determining whether a company that has undergone a change in ownership carries on substantially the same business after the change in ownership and therefore remains responsible for previously incurred liabilities. *Final Redetermination* at 9-11, Pl. Pub. App. Ex. 3, at 9-11.

*II. Commerce's decision to compare Pre-Sale AST to KAI-owned Post-Sale AST for purposes of its Personhood Test is supported by substantial evidence or otherwise in accordance with law.*

Plaintiffs argue that in applying the Personhood Test, Commerce should have compared Post-Sale AST to ILVA as a whole rather than to Pre-Sale AST. This Court finds Commerce properly chose to compare Pre- and Post-Sale AST because "[a]ll of the subsidies that were bestowed on the predecessor operations of AST continued to benefit the business that was separately incorporated as AST as part of the 1993 ILVA demerger." *Final Redetermination* at 17, Pl. Pub. App. Ex. 3, at 17. Pre-Sale AST existed as a separate corporate entity prior to its 1994 privatization, and a reasonable mind could accept this as relevant evidence that Pre-Sale AST is the appropriate entity with which to compare Post-Sale AST.

Although Commerce described the demerger as a non-event in the *Decision Memorandum*, it did so to emphasize there had been no ultimate change in ownership of AST after the demerger. The Government of Italy, through its holding company IRI, continued to own AST before the demerger and until AST's privatization. *Id.*

*III. Commerce's determination that Pre- and Post-Sale AST are the same entity is not supported by substantial evidence on the record or otherwise in accordance with law.*

Commerce cites evidence on the record, developed through the application of the four factors, to support its conclusion that Pre- and Post-Sale AST are the same entity:

(1) *Continuity of General Business Operations*: Commerce found record evidence to indicate that AST production base and products remained the same after privatization. In addition, IRI expected to obtain a higher sale price by selling AST as an operating entity rather than auctioning its individual assets. *Decision Memorandum* at 3, citing AST October 20, 2000 Questionnaire Response at 6. Finally, AST held itself out as a continuation of the previous enterprise by operating under the same name, AST, and by maintaining its access to the markets and customers that KAI had found desirable before purchasing AST. *Decision Memorandum* at 3-4, citing AST October 20, 2000 Questionnaire Response at 41.



(2) *Continuity of Production Facilities*: AST's principal specialty steel production facilities remained located in Terni. *Decision Memorandum* at 4.

(3) *Continuity of Assets and Liabilities*: Commerce found that all of AST's corporate assets were taken over by KAI and that Pre-Sale AST's liabilities were transferred through the privatization intact. *Id.* citing Government of Italy November 14, 2000 Questionnaire Response at 3.

(4) *Retention of Personnel*: Commerce found that KAI intended to maintain the AST workforce in place after privatization. The IMI Report, commissioned by the Government of Italy to value AST, highlighted continuity in AST's personnel. *Decision Memorandum* at 4, citing AST October 20, 2000 Questionnaire Response at 15. Ultimately, Commerce found nothing in the record indicating a substantial change in AST's workforce as a result of the privatization. *Final Redetermination* at 22, Pl. Pub. App. Ex. 3, at 22.

Commerce determined, based upon the totality of the factors considered, that Post-Sale AST was operated in substantially the same manner after the change in ownership as it was prior to its sale. The Court finds that substantial evidence on the record supports Commerce's determinations that there were continuity of general business operations and production facilities and retention of personnel between Pre- and Post-Sale AST. The Court notes, however, that Commerce's analysis of the third factor could lead to the conclusion that no continuity of assets and liabilities remained between Pre- and Post-Sale AST; rather, KAI, in a possible capacity as a separate purchaser, could have become legally responsible for all of AST's assets and liabilities. Defense counsel at oral argument appeared to disavow such a conclusion. Because Commerce's wording is unclear, the Court remands to Commerce to clarify whether KAI, in a capacity as a separate purchaser, became legally responsible for all of AST's assets and liabilities or explain if Post-Sale AST continued to have responsibility for all of Pre-Sale AST's assets and liabilities. If Commerce determines that KAI became legally responsible for all of AST's assets and liabilities, this Court orders Commerce to discuss whether substantial evidence supports its conclusion that Pre- and Post-Sale AST are the same entity.

IV. *Commerce's two-step methodology for determining whether Post-Sale AST continues to receive indirect or direct subsidies granted Pre-Sale AST is not inconsistent with the World Trade Organization Appellate Body's ruling in UK Leaded Bar.*

Plaintiffs claim this Court should construe the countervailing duty statute in accordance with *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, Report of the Appellate Body (May 10, 2000) (*UK Leaded Bar*). In *UK Leaded Bar*, the World Trade Organization Appellate Body upheld the Dispute Settlement Panel's finding that, under the specific circumstances of the case, financial contributions bestowed upon a state-owned company between

1977 and 1986 could not be deemed to confer a benefit upon subsequent corporations that paid FMV to the state-owned company for its "productive assets, goodwill, etc." *UK Leaded Bar* at Paragraph 68. The WTO Appellate Body, however, specifically limited its finding to the particular circumstances of *UK Leaded Bar*. *UK Leaded Bar* at Paragraphs 74, 75(b) and (c). This Court does not therefore find it necessary to consider whether it must construe U.S. countervailing duty law in accordance with *UK Leaded Bar*. This case is limited by its facts, although this Court finds the methodology employed by Commerce to be supported by substantial evidence on the record or otherwise in accordance with law. The Court's holding in this case is not at variance with *UK Leaded Bar*. The cases are clearly distinguishable. In both instances the tribunals have examined unique facts presented and have based their decisions upon those unique facts. Commerce will be obliged in the future to examine facts presented on a case-by-case basis as it applies its methodology to its determinations.

*V. Commerce properly applied the use of facts otherwise available and adverse inferences regarding pre-privatization asset spin-offs from ILVA and post-privatization sales of shares.*

Plaintiffs argue that even if Commerce lawfully applied its Personhood Test, it unlawfully imposed an incorrect subsidy by failing to attribute a portion of the subsidies to pre-privatization spin-offs from ILVA and post-privatization sales of shares. Defendant asserts Commerce properly resorted to use of facts otherwise available and adverse inferences in determining that the pre-privatization asset spin-offs and post-privatization sales of shares had no effect upon AST's subsidy benefits.

Commerce may make a determination on the basis of facts available if an interested party "withholds information that has been requested by the administering authority" or "significantly impedes" a countervailing duty review. 19 U.S.C. § 1677e(a)(2)(A), (C). In addition, Commerce may resort to adverse inferences if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority." 19 U.S.C. § 1677e(b). Because AST failed to provide requested information regarding pre-privatization spin-offs and post-privatization sales of shares, Commerce found the information on the record to be too incomplete to serve as a reliable basis for determining whether the entities sold in the transactions were the same entities that benefitted from subsidies prior to their sale. *See Decision Memorandum* at 7.

In Commerce's October 16, 2000 remand supplemental questionnaire to the Government of Italy, Commerce stated: "The purpose of this remand is to re-examine our change-in-ownership methodology in light of, *inter alia*, *Delverde*. We therefore reiterate our request for complete remand questionnaire responses with regard to all of the changes in ownership. If we determine that this information is necessary to our remand determination and it is [sic] not been provided, we may resort to

facts otherwise available, including assumptions that are adverse to the respondent's interests." *Final Redetermination* at 36, citing Government of Italy October 16, 2000 Remand Supplemental Questionnaire at 3.

AST and the Government of Italy failed to provide the requested information. Instead, AST argued it was irrelevant to Commerce's treatment of AST's privatization and, together with the Government of Italy and the European Commission, "respectfully request[ed] that the Department explain how such information [was] pertinent to the proper scope" of the determination. *Decision Memorandum* at 7, quoting AST October 19, 2000 Supplemental Questionnaire Response at 29. In Commerce's October 27, 2000 supplemental questionnaire, Commerce noted the parties' deficient responses and reiterated its request, but AST and the Government of Italy failed to correct the deficiencies. *Decision Memorandum* at 7. Based upon the parties' affirmative refusals to provide the requested information, Commerce determined that AST and the Government of Italy had failed to cooperate. This Court finds, therefore, that Commerce properly resorted to the use of facts otherwise available and adverse inferences. Because the information on the record was too incomplete to serve as a reliable basis for determining whether the entities sold in the transactions were the same entities that benefitted from subsidies prior to the sale, Commerce properly applied the adverse inference that, once sold, the pre-1993 asset spin-offs did not constitute the same entity as ILVA and that the subsidy benefits therefore remained within ILVA's divisions. Commerce also properly applied the adverse inference that the post-privatization sales of shares did not affect the subsidy benefits to AST.

VI. *Commerce's decision not to attribute a portion of the privatization purchase price to the repayment of prior subsidies is supported by substantial evidence on the record or otherwise in accordance with law.*

Plaintiffs contend Commerce should have applied its pre-*Delverde III* approach of attributing a portion of the privatization purchase price to the repayment of prior subsidies. This argument was rejected by *Delverde III*. See *Delverde III*, 202 F.3d at 1367. Therefore, this Court finds Commerce's decision not to apply its pre-*Delverde III* approach of attributing a portion of the privatization purchase price to the repayment of prior subsidies to be supported by substantial evidence or otherwise in accordance with law.

VII. *Commerce's treatment of the 1993 spinoff of AST is supported by substantial evidence on the record or otherwise in accordance with law.*

Commerce found that as of December 31, 1993, ILVA Residua was "essentially a shell company with liabilities far exceeding assets." *Decision Memorandum* at 9. The majority of ILVA's debt had been placed in ILVA Residua rather than proportionately allocated to the spun-off entities AST and ILP. *Id.* at 10. In such a situation, it is Commerce's "practice to

allocate otherwise untied liabilities remaining in a shell corporation to the new, viable operations that had been removed from the predecessor company." *Decision Memorandum* at 30. Commerce's determination that AST received a benefit through debt forgiveness at the time of the spinoff is therefore supported by substantial evidence.

In valuing the benefit that AST received, Commerce analyzed the creditworthiness of ILVA as a whole. See *Decision Memorandum* at 33. Commerce found that ILVA, of which AST was a part, benefitted from the Government of Italy's ultimate assumption of the losses of the units originally comprising ILVA. *Id.* AST's debt forgiveness occurred at the moment of its incorporation; Commerce reasoned that it would be illogical to base its creditworthiness on AST's future prospects after the debt forgiveness had been granted because the debt forgiveness itself would have an impact upon private, commercial lenders' decisions of whether to lend funds to AST. *Id.*, citing *Stainless Steel Plate in Coils*, 64 Fed. Reg. at 15,524. Therefore substantial evidence supports Commerce's decision to focus upon ILVA's creditworthiness and not to focus upon AST's creditworthiness.

Plaintiffs argue the figure arrived at for the amount of debt forgiven did not account for cash received in sales of viable assets. However, the countervailing duty statute requires Commerce to calculate subsidies upon the basis of the benefit to the recipient rather than upon the cost to the government. See 19 U.S.C. § 1677(5)(E). At the time of the spinoff, AST benefitted to the extent it did not assume a proportional share of ILVA's liabilities. *Decision Memorandum* at 31. Therefore, Commerce properly considered the benefit to AST rather than the ultimate cost to the Government of Italy in conducting its countervailing duty calculations. This Court finds Commerce's calculation of the amount of debt forgiven by the Government of Italy to be supported by substantial evidence on the record or otherwise in accordance with law.

*VIII. Commerce's determinations regarding program-specific issues are supported by substantial evidence on the record or otherwise in accordance with law.*

In addition to disputing Commerce's privatization analysis, Plaintiffs contend Commerce erred in determining that certain subsidies were countervailable. This Court finds that Commerce's determinations regarding these program-specific issues, set forth below in subsections A-D, are supported by substantial evidence on the record or otherwise in accordance with law.

*A. Commerce's finding that the European Social Fund Objective 4 funding is a countervailable subsidy is supported by substantial evidence on the record and otherwise in accordance with law.*<sup>3</sup>

The European Social Fund, operated by the European Commission, provided assistance to AST during the period of review through Objec-

<sup>3</sup>The Court notes that the parties have characterized the European Social Fund Objective 4 funding program as a post-privatization program. See Letter from Hogan & Hartson L.L.P. (on behalf of all parties) to United States Court of International Trade (May 23, 2001), at 3.

tive 4, which funds training for employees in companies undergoing restructuring. Commerce determined that the training programs provided a countervailable benefit to AST because the programs relieved it of a training obligation it would otherwise have incurred. Commerce stated that no new information or evidence of changed circumstances had been submitted to reconsideration of its previous finding that this program is countervailable. *Decision Memorandum* at 15.

Plaintiffs contend there is no basis for Commerce's determination that the European Social Fund Objective 4 funding is specific and therefore countervailable. However, Commerce found that despite its requests for information on the use of Objective 4 funds by the European Community and the Government of Italy, the Government of Italy, the European Union, and AST provided no new information or evidence of changed circumstances in this review to warrant reconsideration of Commerce's finding in this case. *Decision Memorandum* at 34. They did not demonstrate any efforts to obtain the information or offer any alternatives. *Id.* Therefore, Commerce's use of an adverse inference to find *de facto* specificity with respect to this program is supported by substantial evidence on the record or otherwise in accordance with law.

*B. Commerce's determination that the European Coal and Steel Community is an authority that has provided a financial contribution pursuant to 19 U.S.C. § 1677(5)(B) is supported by substantial evidence on the record or otherwise in accordance with law.*<sup>4</sup>

Under Article 54 of the 1951 European Coal and Steel Community Treaty, eligible companies can receive loans for up to 50 percent of the cost of an industrial investment project. The companies apply directly to the European Commission, which administers the European Coal and Steel Community. Once loan approval has been granted, the European Coal and Steel Community borrows funds at commercial rates which it then lends to steel companies at a slightly higher rate to cover administrative costs. Commerce has previously found Article 54 loans to be specific countervailable subsidies, and it stated that no new information or evidence of changed circumstances had been submitted in this proceeding to warrant reconsideration of its finding. *Decision Memorandum* at 14.

During the period of review, AST had one such outstanding loan, contracted in 1978. In 1987, the interest rate on this loan was reduced even though ILVA was not creditworthy. Therefore, Commerce treated the loan as if it were contracted in 1987 and calculated the benefit AST received by comparing the interest amount it should have paid at the benchmark interest rate for uncreditworthy companies to the amount AST actually paid during the period of review. *Id.* at 15.

<sup>4</sup> The Court notes that the parties have characterized the European Coal and Steel Community Article 54 loan program as a post-privatization program. See Letter from Hogan & Hartson L.L.P. (on behalf of all parties) to United States Court of International Trade (May 23, 2001), at 3.

Plaintiffs argue that because the European Coal and Steel Community does not convey government funds to borrowers, the loans do not constitute a financial contribution provided by a public entity as required by 19 U.S.C. § 1677(5)(B). In response, Commerce has stated that "we see no requirement in the [Subsidies and Countervailing Measures] Agreement nor the Act that the financial contribution must be funded in a particular manner." *Id.* at 35. Plaintiffs have not directed this Court's attention to any statutory requirement that a financial contribution involve the expenditure of public funds.

Commerce has stated that the European Coal and Steel Community "is part of the European Union, which undeniably is a particular form of governmental body." *Stainless Steel Plate in Coils*, 64 Fed. Reg. at 15,529. Commerce, citing 19 U.S.C. § 1677(5)(D)(i), has also stated that "a financial contribution includes the direct transfer of funds, such as the provision of loans." *Decision Memorandum* at 35. This Court therefore finds Commerce's determination that the European Coal and Steel Community is an authority that has provided a financial contribution pursuant to 19 U.S.C. § 1677(5)(B) is supported by substantial evidence on the record or otherwise in accordance with law.

C. Commerce's determination that Law 451/94 retirement benefits to retirees are countervailable is supported by substantial evidence on the record or otherwise in accordance with law.<sup>5</sup>

When AST and ILP were spun off in preparation for their privatization, much of ILVA's redundant workforce was placed in ILVA Residua. *Decision Memorandum* at 2. Under Law 451/94, qualified steel workers applying for benefits in 1994, 1995, and 1996 could receive early retirement packages.

Commerce had previously found this program to be specific and stated that at the time of negotiating the terms of the lay-offs, ILVA, the labor ministry, and the unions knew the government would ultimately make contributions to worker benefits. See *Decision Memorandum* at 12. In keeping with past practice, therefore, Commerce treated half of the amount paid by the government as a financial contribution benefiting ILVA. *Id.* Plaintiffs claim Law 451/94 retirement benefits to retirees are not countervailable because AST had no *de jure* or *de facto* obligation to retain the workers who chose to retire early. In its *Decision Memorandum*, Commerce cites to its past finding of countervailability of Law 451/94 retirement benefits. See *Decision Memorandum* at 12, citing *Stainless Steel Plate in Coils*, 64 Fed. Reg. at 15,514. There, Commerce recognized that the entities spun-off from ILVA would be required to enter into negotiations with the unions before laying off workers. See *Stainless Steel Plate in Coils*, 64 Fed. Reg. at 15,514-15. It also pointed to statements by Government of Italy officials at verification indicating labor unrest, strikes, and lawsuits would result from failure to negotiate

<sup>5</sup> The Court notes that the parties have characterized the Law 451/94 retirement benefits program as a post-privatization program. See Letter from Hogan & Hartson L.L.P. (on behalf of all parties) to United States Court of International Trade (May 23, 2001), at 3.



a separation package. *Id.* Plaintiffs provided no new information or evidence of changed circumstances to Commerce to warrant a reconsideration of its finding that AST was relieved of having to assume a respective portion of the redundant workers placed in ILVA. *Decision Memorandum* at 12. Therefore, Commerce's determination that Law 451/94 retirement benefits to retirees are countervailable is supported by substantial evidence on the record or otherwise in accordance with law.

*D. Commerce's determination that the 1988 Finsider payment to ILVA is countervailable is supported by substantial evidence on the record or otherwise in accordance with law.*

Plaintiffs argue that Finsider's payment to ILVA in September of 1988 was not countervailable because it was not tied to subject merchandise. Commerce, however, considers equity infusions as untied subsidies benefitting the recipient company's total consolidated sales. *See Countervailing Duties, Final Rule*, 63 Fed. Reg. 65,348, 65,400 (Nov. 25, 1998). Plaintiffs have not demonstrated that the benefits of the equity infusion were tied to non-steel activities. *See Decision Memorandum* at 37, citing *Stainless Steel Plate in Coils*, 64 Fed. Reg. at 15,527. This Court therefore finds Commerce's determination that the 1988 Finsider payment to ILVA is countervailable is supported by substantial evidence on the record or otherwise in accordance with law.

#### CONCLUSION

Upon consideration of Plaintiffs' motion for judgment upon the agency record under Rule 56.2, Defendant's and Defendant-Intervenor's memoranda in opposition thereto, and other pertinent papers, Plaintiffs' motion is denied. The Department of Commerce's determination in *Final Results* is remanded to Commerce to explain whether it has determined that KAI, in a capacity as a separate purchaser, became legally responsible for all of AST's assets and liabilities or explain if Post-Sale AST continued to have responsibility for all of Pre-Sale AST's assets and liabilities.

If Commerce has determined that KAI became legally responsible for all of AST's assets and liabilities, Commerce is directed to explain whether substantial evidence on the record supports its conclusion that continuity of assets and liabilities remained between Pre- and Post-Sale AST. If Commerce determines that substantial evidence does not support the conclusion that continuity of assets and liabilities remained between Pre- and Post-Sale AST, Commerce is directed to explain whether substantial evidence on the record supports its determination that Pre- and Post-Sale AST are the same entity.

If Commerce determines that substantial evidence on the record does not support its determination that Pre- and Post-Sale AST are the same entity, Commerce is directed to explain whether Post-Sale AST received benefits from the countervailable subsidies made to Pre-Sale AST. If Commerce determines that Post-Sale AST did not receive benefits from the countervailable subsidies made to Pre-Sale AST, Commerce is directed to explain which of the eight subsidy programs listed in this opin-

ion are not countervailable against Post-Sale AST and why they are not countervailable against Post-Sale AST.

Commerce is directed to file its redetermination with the Clerk of this Court no later than the close of business on Monday, June 24, 2002; any responses by Plaintiffs must be filed with the Clerk of this Court no later than the close of business on Monday, July 1, 2002; any rebuttal comments by Defendant and Defendant-Intervenors must be filed with the Clerk of this Court no later than the close of business on Monday, July 8, 2002.

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(Slip Op. 02-52)

VIRAJ GROUPE LTD., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT,  
AND CARPENTER TECHNOLOGY, CORP., ET AL., DEFENDANT-INTERVENORS

Court No. 00-06-00291

[Department of Commerce's Remand Redetermination, *Viraj Group, Ltd. v. United States*, Court No. 00-06-00291, Slip Op. 02-24 (February 26, 2002) is remanded to the Department of Commerce for reconsideration.]

(Dated June 4, 2002)

*Abbondi, Foster, Sobin & Davidow (Peter Koenig)*, Washington, D.C., for Plaintiff.

*Robert D. McCallum, Jr.*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Lucius B. Lau*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *David W. Richardson*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

*Collier Shannon Scott, PLLC (Robin H. Gilbert, Laurence J. Lasoff)*, Washington, D.C., for Defendant-Intervenors.

#### OPINION

CARMAN, *Chief Judge*: Pursuant to 28 U.S.C. § 1581(c) (2000), this Court has jurisdiction to review the Department of Commerce's approach to the Indian rupee's devaluation in Final Results of Redetermination Pursuant to Court Remand, *Viraj Group, Ltd. v. United States of America and Carpenter Technology, Corp., et al.*, Slip Op. 02-24 (CIT February 26, 2002) (*Remand Redetermination II*). This Court will sustain *Remand Redetermination II* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

#### BACKGROUND

On February 26, 2002, this Court remanded to the Department of Commerce (Commerce) the Final Results of Redetermination Pursuant to Court Remand, *Viraj Group, Ltd. v. United States of America and Carpenter Technology, Corp., et al.*, Slip Op. 01-104 (CIT August 15,

2001). The Court ordered Commerce: (1) to consider how to apply a currency conversion methodology that best reaches an accurate dumping margin in this case; (2) if necessary, to recalculate the Plaintiff's dumping margin using a methodology that furthers the congressional goal of accuracy in dumping determinations; (3) to explain if different currency exchange rates were used in the dumping margin calculations, if the use of different rates was appropriate, and if not appropriate, to make any necessary corrective calculations; and (4) to explain the significance of the Plaintiff's pricing decisions to Commerce's determinations of whether the change in rupee valuation in this case constituted a fluctuation to be ignored. On April 12, 2002, Commerce filed *Remand Redetermination II* with this Court.

#### ANALYSIS

This Court first ordered Commerce to consider how to apply a currency conversion methodology that best reaches an accurate dumping margin in this case. In response, Commerce explained that the currency conversion methodology originally applied is "the best for calculating a fair and accurate dumping margin." *Remand Redetermination II* at 3.

Commerce's explanation is based upon the principle that potential price discrimination occurs on the date of sale (DOS) to the United States because on that date the producer decides and fixes the quantity and price of the merchandise. *Id.* The date of sale is the "date at which [the producer] assesses its costs and makes its competitive, economic decision to complete the sale." *Id.* at 5. Because dumping occurs on the date of sale, "Viraj's subsequent currency gains and losses on the sale following this date \* \* \* are simply immaterial to the Department's calculation of dumping margins." *Id.* at 5-6. Subsequent currency gains and losses would only be relevant if Viraj had factored them into its date of sale pricing decisions. *Id.* at 4. Absent evidence of "forward-thinking" pricing, Commerce simply uses the exchange rate contemplated by the seller on the date of sale in order to compare pricing practices between markets. *Id.* at 3-4.

Although Commerce's currency conversion methodology is likely the best for calculating a fair and accurate dumping margin in many cases, Commerce has not persuaded the Court that its methodology best reaches an accurate dumping margin in *this* case. Despite labeling subsequent currency gains and losses as "immaterial" to its dumping margin determination, Commerce has in the past recognized their potential to distort dumping margin calculations. In *Policy Bulletin 96-1*, Commerce stated, "We are continuing to examine the application of the [exchange rate] model in situations where the foreign currency depreciates substantially against the dollar over the period of investigation or the period of review. In those situations, it may be appropriate to rely on daily rates." *Notice: Change in Policy Regarding Currency Conversions*, 61 Fed. Reg. 9,434, 9,435 n.2 (Mar. 8, 1996) (*Policy Bulletin 96-1*). Commerce also stated that "in both investigations and reviews, whenever the decline in the value of a foreign currency is so precipitous and large

as to reasonably preclude the possibility that it is only fluctuating, the lower actual daily rates will be employed from the time of the large decline." *Id.* at 9,436.

Commerce later developed the definition of "precipitous and large" in cases such as *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 64 Fed. Reg. 30,664 (June 8, 1999) (*Stainless Steel from Korea*), where the won declined 40 percent over two months, and *Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 56,759, 56,763 (Oct. 21, 1999) (*Pipes and Tubes from Thailand*), in which the baht dropped 18 percent in one day. In those cases, Commerce resorted to the use of daily exchange rates for currency conversion purposes for home market sales matched to U.S. sales. However, even where Commerce has not considered a currency devaluation to be "precipitous and large," Commerce has addressed a devaluation's distorting effect upon dumping margin calculations. For example, in *Notice of Final Determination of Sales at Less Than Fair Value: Extruded Rubber Thread from Indonesia*, 64 Fed. Reg. 14,690, 14,693 (Mar. 26, 1999) (*Rubber Thread from Indonesia*), the rupiah decreased in value by more than 50 percent over five months. Commerce considered the decline "steady" and "significant." *Id.* Consequently, Commerce used two price averaging periods to determine whether sales at less than fair value existed because "using a single averaging period would result in a distortion of the dumping calculation." *Id.*

Commerce states that "the facts and circumstances on the record in the instant review do not motivate any general consideration of the issue of depreciating currencies, as the Court invites Commerce to do." *Remand Redetermination II* at 5. Had the rupee's devaluation been as rapid and large as the currency devaluations in *Stainless Steel from Korea* and *Pipes and Tubes from Thailand*, Commerce posits that Viraj would have been one among many market participants revising their expectations based upon the most current exchange rate data available. *Remand Redetermination I* at 3-4. In such a case, Commerce's dumping margin calculations would reflect the changed pricing decisions. *Id.* at 4. However, because Viraj as an individual market participant provided no evidence of changed pricing as a result of the rupee's gradual devaluation, Commerce asserts it need not consider whether the devaluation distorted its calculations. *Id.* at 4-5; see also *Remand Redetermination II* at 4-5.

Despite Commerce's assertion to the contrary, this Court finds the facts and circumstances on the record in the instant review do indicate a need to consider the issue of depreciating currencies in order to reach a fair and accurate dumping margin determination. Commerce stated there were "no extraordinary aspects to the observed movement in the rupee between November 3, 1997 and November 30, 1998," but it also recognized that the 14.6 percent depreciation of the rupee was not

small. *Remand Redetermination I* at 4-5. Furthermore, Commerce has acknowledged that, were it to account for the depreciation in its calculations, the dumping margin would be lower. *Id.* at 5. The depreciation therefore appears to be substantial if not precipitous. This Court would find helpful an examination by Commerce of whether a "substantial" devaluation merits the same treatment given "precipitous and large" devaluations. *Policy Bulletin 96-1* appears to consider two separate scenarios rather than merely the one presented by Commerce in this case.

The steep and precipitous currency declines in *Stainless Steel from Korea* and *Pipes and Tubes from Thailand* may have had a clear effect upon pricing decisions in those cases, but "the rupee's downward movement, while small and gradual, appears cumulatively to have had more than a *de minimis* effect upon Commerce's dumping margin calculations." *Viraj Group, Ltd. v. United States*, 193 F. Supp. 2d 1331, 1338 (Ct. Int'l Trade 2002). Viraj's apparent decision not to hedge against currency valuation changes does not necessarily reflect a decision to sell below value. The application of Commerce's standard currency conversion methodology in this case is unreasonable where "a more accurate methodology is available and has been used in similar cases." *Thai Pineapple Canning Ind. Corp. v. United States*, 273 F.3d 1077, 1085 (Fed. Cir. 2001). The case before this Court is no different in principle from *Stainless Steel from Korea*, *Pipes and Tubes from Thailand*, and *Rubber Thread from Indonesia*. This Court therefore remands once more to Commerce to apply a more accurate currency conversion methodology to its dumping margin calculations in this case.

This Court also ordered Commerce to explain if different currency exchange rates were used in the dumping margin calculations, if the use of different rates was appropriate, and if not appropriate, to make any necessary corrective calculations. Commerce stated that "no currency conversion is done by the Department" because the Department compares cost data reported in the home market currency with home market sales in the home market currency. *Remand Redetermination II* at 5. However, in the absence of a suitable comparison sale in the comparison market, Commerce uses cost data to reach a constructed value. In such a situation, "[t]he appropriate exchange rate is employed to convert the constructed value and compare it to the U.S. sale just as we would convert a comparison market price." *Id.* Currency conversion does appear, therefore, to be "done by the Department." However, although Commerce consistently uses the DOS exchange rate throughout the review, such an exchange rate does not appear to facilitate an accurate comparison in this case.

Finally, this Court ordered Commerce to explain the significance of the Plaintiff's pricing decisions to its determinations of whether the change in rupee valuation in this case constituted a fluctuation to be ignored. The Court is satisfied with Commerce's explanation of the importance of Plaintiff's pricing decisions upon dumping margin determinations. However, it is not satisfied that Commerce has explained the

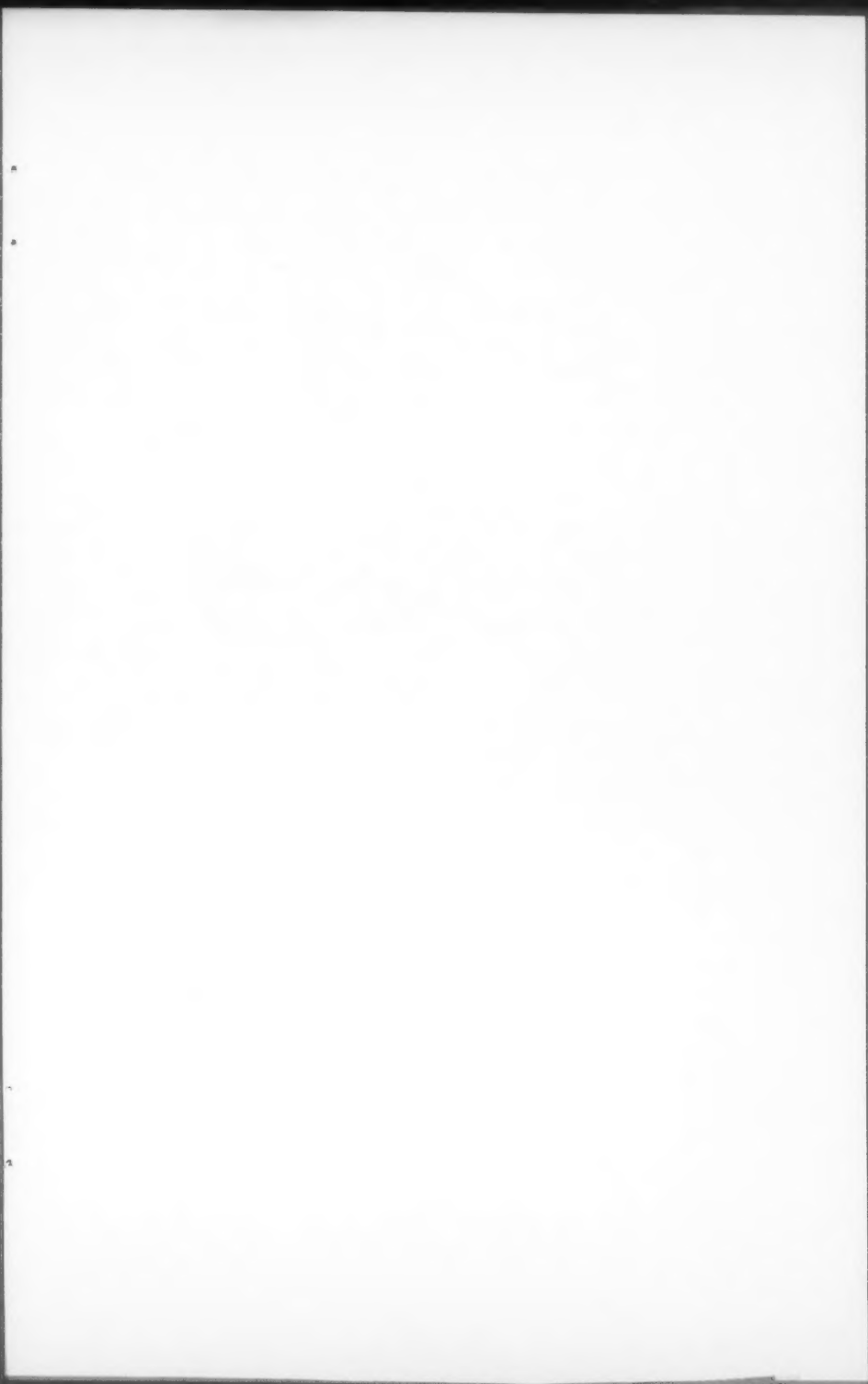
importance of a producer's pricing decisions upon whether the change in currency valuation constitutes a fluctuation to be ignored. The significance of a producer's pricing decisions is particularly unclear in this case where a steady, gradual, but significant devaluation may have affected the normal value of the subject merchandise after the producer set the export price.

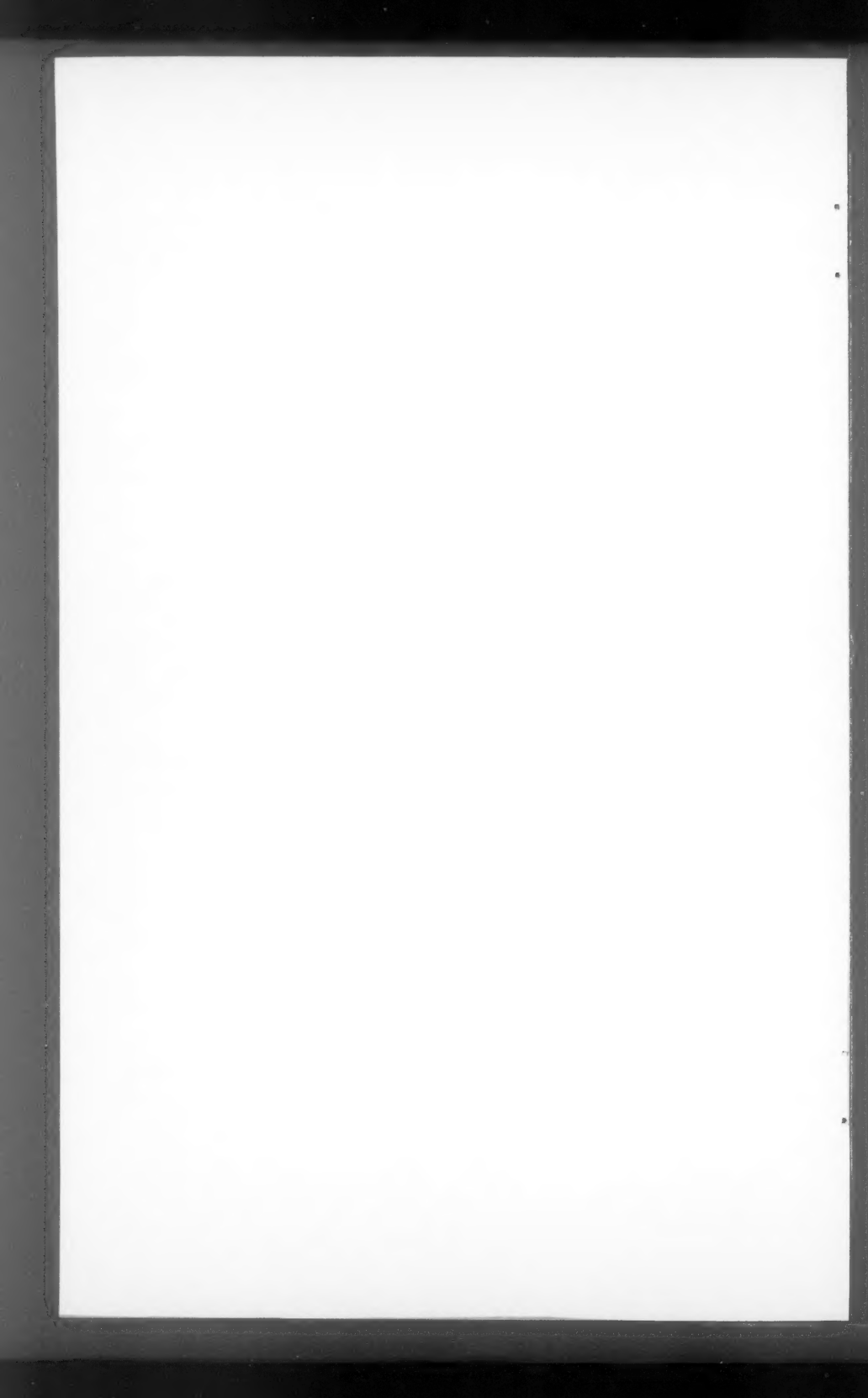
#### CONCLUSION

The Court does not find *Remand Redetermination II* to be supported by substantial evidence on the record, or otherwise in accordance with law. This Court therefore remands once again to Commerce to (1) apply a currency conversion methodology that reaches a more accurate dumping margin in this case by accounting for the rupee's depreciation in Commerce's dumping margin calculations; (2) explain to this Court why such a methodology does or does not further the congressional goal of accuracy in dumping determinations; and (3) explain to this Court which method it chooses to apply in this case, apply that method, and give an explanation of its reasons for doing so.

Commerce is directed to file its redetermination with the Clerk of this Court no later than the close of business on Wednesday, June 19, 2002; any responses by Plaintiffs must be filed with the Clerk of this Court no later than the close of business on Wednesday, June 26, 2002; any rebuttal comments by Defendant and Defendant-Intervenors must be filed with the Clerk of this Court no later than the close of business on Wednesday, July 3, 2002.









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